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Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 44.

D. G. WILLIAMS,
Plaintiff in Error,
against
CITY OF TALLADEGA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF ALABAMA.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

RUSH TAGGART,
For Plaintiff in Error.

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Of Counsel.

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CASES CITED IN ARGUMENT.

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Statement.

This is a writ of error to review the judgment of the Supreme Court of Alabama affirming a judgment of the City Court of Talladega.

D. G. Williams, plaintiff in error, was convicted under a city ordinance of doing a telegraph business in the city of Talladega without a license. The complaint in the action alleged that he violated a city ordinance of the city of Talladega, in that between October 1st, 1908, and December 31st, 1908, as agent of the Western Union Telegraph Company he transacted business within the city of Talladega without first taking out and paying for a license as required by the provis-

ions of an ordinance of said city (Record, page 4). The ordinance in question was Ordinance No. 180, and provides as follows:

"Be it ordained by the City Council of Talladega, that the following be, and is hereby, declared to be the schedule of licenses for the divers businesses, vocations, occupations and professions carried on or conducted in the city of Talladega, to wit:

* * * * * *

158. Telegraph Company. Each person, firm or corporation commercially engaged in business sending messages to and from the city to and from points in the state of Alabama for hire or reward. $100.

* * * * * * *

"SEC. 2. Be it further ordained by the City Council of Talladega, that the license required by this ordinance is and is declared to be in the exercise of the police power of the city of Talladega, as well as for the purpose of raising revenue for said city.

"SEC. 3. Be it further ordained by the City Council of Talladega that no person, firm or corporation shall conduct, engage in or carry on any trade, business, profession or vocation, for which a license is required by this ordinance, or any other ordinance of the city without first obtaining from the city clerk of Talladega a license therefor and paying to such clerk the prescribed amount thereof, as hereinbefore fixed. And when such person, firm or corporation is engaged in two or more of such businesses, vocations, callings or professions, for which a license is required, such person, firm or corporation shall pay for and take out a license for each of the same.

"SEC. 4. Be it further ordained by the City Council of Talladega that any person, firm or corporation, who shall engage in any trade, business or profession, or keep any establishment, or do any act or maintain an office for which a license is required by the city of Talladega, without first obtaining such license, shall be guilty of an offense, and upon conviction therefor, shall be fined not less than one and not more than one hun-

dred dollars for each offense, and each day shall constitute a separate offense."

Record, pages 7-15-16-17.

To the complaint based upon this ordinance the defendant entered two pleas: (first), not guilty; and (second) that at the time of the alleged violation of the ordinance he was the duly appointed manager of the office of The Western Union Telegraph Company, at the city of Talladega, Alabama; that the said Western Union Telegraph Company was at such time and prior to the 5th day of June, 1867, and is now a corporation organized and existing under the laws of the State of New York, and is now and was at the times herein mentioned, pursuant to its charter, engaged in the business of a telegraph company in and between the different states of the Union and in the State of Alabama, and has complied with all the requirements of law authorizing it to do business in the State of Alabama, and on or about the 5th day of June, 1867, accepted the provisions of the Act of Congress approved the 24th day of July, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the government of the United States the use of the same for postal, military and other purposes"; that the said company has had for the last several years and during the year 1908, and has now an office and place of business in the city of Talladega, Alabama, and was at the times hereinafter mentioned engaged in the business of transmitting messages between private parties and between the departments of the United States Government, its agents and officers, from Talladega to other points in the State of Alabama, and also from other points in the State of Alabama to Talladega, giving priority to said official telegraphic communications, and charging such reduced rates, as were fixed by the Postmaster General of the United States; that at the times herein mentioned, the said Western Union Telegraph Company was engaged in the business of transmitting messages, as aforesaid, over its lines which are constructed, maintained and operated on the right of way of the Southern Railway and the Louisville and Nashville Railroad, both public Railroads, into and out of the city of Talladega, and on and over the public streets of the city of Talledega and on and over other

public railroads and public highways into and through the State of Alabama and other States of the Union; that the Southern Railway, the Louisville and Nashville Railroad and the streets in the city of Talladega upon and over which the company's lines are constructed, maintained and operated are public highways and are post roads of the United States; that in all such cases said lines of the said Western Union Telegraph Company are so constructed and maintained as not to obstruct the navigation of the navigable streams which they cross, and the ordinary travel of such military post roads; that as manager of the said office and under the name and direction and appointment of the said Western Union Telegraph Company and as an agent of the Government of the United States, and in no other capacity, the defendant was engaged in said telegraph business at the time of the alleged violation of the said ordinance and the times mentioned herein (Record, pages 4 and 5).

Upon motion of the attorney for the city of Talladega, the court struck from the files defendant's plea No. 2, (the defendant duly excepting) (Record, page 6), and defendant was compelled to go to trial upon the simple plea of not guilty. Upon the trial Ordinance No. 180 was offered in evidence, and an agreed statement of facts was submitted. This agreed statement of facts was that during the months of October, November and December, 1908, defendant was employed by the Western Union Telegraph Company as manager in the office at Talladega; that the telegraph company was a corporation organized under the laws of the State of New York, and that it accepted the provisions of the Act of Congress of July 24, 1866; that for several years and during 1907 and 1908 it had an office in the city of Talladega and was engaged in the business of transmitting messages between private parties and the departments and agencies of the United States Government from Talladega to other points in the State of Alabama and also from other points in the State of Alabama to Talladega; that the city of Talladega adopted an ordinance No. 180, the provisions of which are hereinbefore set forth; that the authorities of the city demanded the payment of $25 from the defendant and his employer as a quarter's license under said ordinance, alleged to be due October 1, 1908; that defendant and his employer

refused to pay the same on the ground that the same was illegal, invalid, arbitrary, excessive, confiscatory and unjust; that thereupon a warrant was issued charging defendant with doing business in the city without a license and defendant was arrested and tried upon said charge and convicted in the Mayor's court of said city; that he was fined $25 and costs, and in the event of his failure to pay such fine and costs, he was sentenced to labor on the streets for the city for fifty days; that defendant's employer pays taxes on its lines and other property in the state at a valuation as fixed by the State Board of Assessors, and that defendants paid to the state of Alabama $4,237.45 as taxes for the year 1907 upon the capital employed in the state, in addition to taxes amounting to $12,944.67 upon the physical property of the company; that on or about the 5th day of June, 1867, the Western Union Telegraph Company filed with the Postmaster General of the United States its written acceptance of the provisions of an Act of Congress, approved July 24, 1866, entitled

> "An Act to aid in the construction of telegraph lines and to secure to the Government of the United States the use of the same for postal, military and other purposes" (Record, pp. 18 and 19).

The agreed statement of facts provided that should either party wish to show any other or further facts, it might be done in the usual way, and accordingly the defendant in his own behalf testified that the lines of the Western Union Telegraph Company enter and leave the city of Talladega over the right of way of the Southern Railway and the Louisville and Nashville Railroad, which are public railroads; that within the city of Talladega the company has two lines which leave the rights of way of the railroad companies and proceed along the public streets of the city to the office of the company (Record, p. 22). The same witness also testified that Government messages were relayed daily at the Talladega office; that he received messages between the different departments of the Government of the United States at this office from points within the state; that the Government messages were given a preference and were sent at reduced rates (Record, p. 22).

The uncontradicted evidence shows that there was expended at the Talladega office by its manager during the months of January, February, March, April, May and June, 1908, the sum of $549.83 ; during the months of July, August and September, 1908, $265.91, and during the months of October, November and December, 1908, the sum of $289.83, or a total for the year of $1,105.57. In addition to the foregoing amounts there was expended for the operation of the office in 1908 the following amounts :

Superintendence	$130 00
Stationery	30 00
Battery supplies	63 00
Maintenance of lines and batteries	600 00
	$823 00

or a grand total of $1,928.57 (Record, pages 23, 24).

The receipts on intra-state business for February, March, April, May and June, 1908, were $217.05, and the interstate receipts for the months of January, February, March, April, May and June, 1908 were $937.01. The intrastate receipts for the months of July, August and September, were $120.49; for the months of October, November and December, 1908, $128.16 (Record, page 21), making the total for the intra-state receipts for eleven months, $465.70, and the total for both interstate and intra-state $2,190.50 (Record, page 23). It is a conceded fact that the license fee of $100 per annum for the privilege of doing business in Talladega for the year 1908 with other points in Alabama for the United States Government and the public, exceeded the entire net revenue derived from such business in that city.

The uncontradicted testimony further shows that during the year 1908 nothing was expended by the city of Talladega for police regulation or inspection of the office or property in the city of Talladega (Record, page 23).

Upon the foregoing agreed facts and testimony the city court adjudged the defendant guilty of doing a telegraph business without a license and ordered that he pay the city of Talladega a fine of $25 and the costs of prosecution. Thereupon the defendant prayed an appeal to the Supreme Court of Alabama (Record, page 6).

Upon the appeal in the Supreme Court of Alabama, that court overruled the objections made by defendant to the conviction, and all his exceptions, and affirmed the judgment of the lower court, and in so doing, passed upon the questions raised by the defendant as to the right to do an intra-state telegraph business within the city upon lines located wholly upon Post Roads without complying with the requirements of the ordinance of the city of Talladega by first taking out and paying for a license as required by the provisions of said city ordinance. The opinion of the Supreme Court of Alabama will be found on pages 28–36 of the record.

Thereupon the defendant sued out a writ of error to this court, and the Federal questions relied upon are those concerning the rights of the Western Union Telegraph Company, by virtue of its acceptance of the provisions of the Act of Congress of July 24, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the Government of the United States the use of the same for postal, military and other purposes."

ARGUMENT.

The construction of the Act of Congress of July 24, 1866, relied upon by Plaintiff in Error is that it granted to the telegraph company accepting its provisions the right to go into any state, and as an agency of the government to construct, operate and maintain telegraph lines along over and upon the post roads, and over under or across the navigable waters of the United States.

This act, carried into Section 5263 of the Revised Statutes of the United States, provides that:

> "Any telegraph company now organized, or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and

along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

(For full text of Act see *post*, p. 37).

Section 5264 provides for the use of materials from public lands; Section 5265 prohibits the transfer of the rights and privileges under the provisions of the act. Section 5266 gives the government priority in the transmission of messages; Section 5267 grants to the government the right, for postal, military or other purposes, to purchase all the telegraph lines from any companies acting under the provisions of the Act at an appraised valuation, and Section 5268 requires the acceptance of the obligations of the Act to be filed before any telegraph company shall exercise any of the powers or privileges conferred by the Act.

The question which we have to discuss is whether this was an act intended to confer upon a telegraph company accepting and complying with its provisions a franchise to carry on an intra-state business along and upon Post Roads, so that a state could not require of it the payment of a license tax for the privilege of carrying on such business. The Act was construed by the Supreme Court of Alabama so as to deny that any such franchise was granted to the telegraph company by this Act of Congress.

In the main brief filed in this case, the question of the power of Congress as well as the intent in the passage of the Act has been admirably presented, and what we shall have to say in this brief is in the way, simply, of a supplement to the forcible argument therein contained.

In the first case involving the provisions of the Act (Pensacola Telegraph Company vs. Western Union Telegraph Company, 96 U. S., 1), Mr. Chief Justice WAITE delivered the opinion of the court and based the conclusions of the court upon the power of Congress to regulate commerce with foreign nations and among the several states, and upon its power to

establish postoffices and post roads, and that the Constitution of the United States made all the laws enacted by Congress in pursuance of these powers the supreme law of the land.

It is true that in that case and in subsequent cases the power of Congress in the regulation of commerce is so prominent in the minds of the Justices of this court and in the expressions in the opinions that a hasty reading of the opinions might create the impression that all rights of the telegraph company depend upon its relation to interstate commerce, whereas the fact is that the important clause of the constitution considered in the argument of the case, and the one which should be considered in every case involving the Act, is the clause relating to *postoffices and post roads*. It is significant that the Act itself does not in any way refer to the question of interstate commerce, and was passed by Congress evidently in pursuance of a design to increase the postal facilities of the United States, and in pursuance of the right of Congress over its post roads. Mr. Chief-Justice WAITE makes it perfectly clear in his decision of the Pensacola case that he had both powers in mind, as shown by the following excerpt from that opinion:

> "Congress," says Chief-Justice WAITE, "has power to 'regulate commerce with foreign nations and among the several states' (Const., art. 1, sec. 8, par 3); and 'to establish post-offices and post roads' (*Id.*, par. 7). The Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land (Art. 6, par. 2). A law of Congress made in pursuance of the Constitution suspends or overrides all State statutes with which it is in conflict.
>
> "Since the case of Gibbons v. Ogden (9 Wheat., 1) it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating powers of Congress. *Post-offices and post roads are established to facilitate the* transmission of intelligence. Both commerce *and* the postal service are placed within the power of Congress, because, being national in their operation, *they* should be under the protecting care of the national government. (Italics ours.)

"The powers thus granted are not confined to the instrumentalities of commerce, *or the postal service* known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. *They were intended for the government of the business to which they relate, at all times and under all circumstances.* As they were intrusted to the general government for the good of the nation, *it is not only the right, but the duty of Congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation.*

"**It is not only important to the people, but to the Government.** By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring *anywhere* that effects the interests they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling powers of Congress, *certainly as against hostile State legislation.* * * *

"It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, *and exclude all others from its use.* **The present case is satisfied if we find that Congress has power by appropriate legislation to prevent the States from placing obstructions in the way of its usefulness.**

"The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. *It legislates for the whole nation, and is not embarrassed by state lines.* **Its**

peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all. * * *

"The statute of July 24, 1866, in effect, amounts to a prohibition of all state monopolies in this particular. It substantially declares, in the interest of commerce *and* the convenient transmission of intelligence from place to place by the government of the United States *and its citizens*, that the erection of telegraph lines shall, **so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege.** To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the states, *and is appropriate legislation to carry into execution the powers of Congress over the Postal service.*"

This original construction of the meaning of the Act of Congress of July 24, 1866, has never, as we understand, been modified or changed although there have been many decisions of this court relating to the effect and obligations of the Act. We do not attempt to distinguish or discuss all these cases, but to apply this fundamental construction of the Act as made by this court.

What, Then, Does the Act Confer Upon the Telegraph Company?

The decision in that case was clearly that no state by legislation can prevent the construction of telegraph lines. There is given to the telegraph company not only the right to construct, but to maintain and operate, and the right to maintain and operate is given as fully and completely as the

right to construct, and the question, then, is whether this right to operate is simply to operate as to interstate business free from obstructions by the state or its municipalities? Is it the right simply to operate from point to point within the state as a government agent for the transmission of government messages, or is it the right to operate for any and all business which may be offered the telegraph company, interstate and intra-state, government and private messages alike?

It is our contention that the latter is the fair and just meaning of that Act of Congress, and that Congress had in mind not only the doing of business by the telegraph company for the departments of the government as an agency of the government and thus free from interference of the state, but equally to do business for other persons, because the telegraph companies recognized by the first section of the Act were at that time engaged in that kind of business, and the Act is to be interpreted with reference to the conditions obtaining when the Act was passed.

With respect to the rule of construction, we call attention to the leading case of Charles River Bridge vs. Warren Bridge, 11 Pet., 420, where it is said, p. 557:

> "Much discussion has been had at the bar, as to the rule of construing a charter or grant, and many authorities have been referred to on this point. In ordinary cases a grant is construed favorably to the grantee, and against the grantor. But it is contended that in governmental grants, nothing is taken by implication. The broad rule thus laid down, cannot be sustained by authority. If an office be granted by name, all the immunities of that office are taken by implication. *Whatever is essential to the enjoyment of the thing granted, must be taken by implication.* And this rule holds good, whether the grant emanate from the royal prerogative of the king of England, or under an act of legislation in this country. The general rule is, that 'a grant of the king, at the suit of the grantee, is to be construed most beneficially for the king, and most strictly against the grantee'; but grants obtained as a matter of special favor of the king, or *on a consideration*, are more liberally construed."

> "Where the legislature, with a view of advancing the public interest by the construction of a bridge, a turnpike road, or any other work of public utility, grants a charter, no reason is perceived why such a charter should not be construed by the same rule that governs contracts between individuals. The public, through their agent, enter into the contract with the company, and a valuable consideration is received in the construction of the contemplated improvement. This consideration is paid by the company, and sound policy requires that its rights should be ascertained and protected *by the same rules as are applied to private contracts.*"

In United States vs. Denver, etc., Ry. Co., 150 U. S., 1, the rule of construction in grants of this character is thus defined by this court (p. 14) :

> "When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi-public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted."

The language of the foregoing cases has peculiar application to the Telegraph Company's rights under the Act of July 24, 1866, because the considerations passing from the government of the United States to the telegraph company are clearly defined in that act as well as the considerations which pass from the telegraph company to the government of the United States.

The considerations moving to the government of the United States are very in terms set forth. By section 5266 the government business is given priority over all other busi-

ness in the transmission of messages; by section 5267 the government is given the right, for postal, military and other purposes, to purchase all the telegraph lines of the companies accepting the provisions of the act at an appraised valuation; the government is also given the right, through the Postmaster General, to have preferential rates, and year by year the telegraph company has been complying with this provision of this act and giving the government the benefit of this consideration, amounting annually to a large sum of money.

In consideration of this, the principal grant by the government to the telegraph company is the right "to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, and over, under or across the navigable streams of waters of the United States."

In Brown vs. Maryland, 12 Wheaton, 436, MARSHALL, C. J., delivering the opinion of the court, says, p. 267:

> "The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties."

If, as MARSHALL, C. J., thus clearly indicates, it is the duty of the government to secure to the importer the consideration for the duty which he pays, namely, the right to sell the articles imported, it is the duty of this court, in considering the act of July 24, 1866, to so construe it as to secure to the telegraph company the right to "construct, maintain and operate" telegraph lines in accordance with the express grant contained in the act, in view of the large considerations which continually move to the government from the telegraph company by virtue of its acceptance and compliance with the provisions of that act.

That a franchise was granted to the telegraph company by Congress is, we think, perfectly clear by the decision of this court in California vs. Pacific Railroad Co., 127 U. S., 1, in which this court says (p. 35):

> "The Central Pacific Railroad Company was constituted by the consolidation of two state corporations of California, but derived many of its franchises and privileges from the government of the United States * * * (p. 38).
>
> "If we turn to the Acts of Congress referred to by the court, we shall find that franchises of the most important character were conferred upon this company. * * * Thus, without referring to the other franchises and privileges conferred upon this company, the fundamental franchise was given by the acts of 1862 and the subsequent acts, to construct a railroad from the Pacific Ocean across the State of California and the Federal Territories until it should meet the Union Pacific; which it did meet at Ogden in the Territory of Utah. This important grant, though in part collateral to, was independent of, that made to the company by the State of California, and has ever been possessed and enjoyed. * * *
>
> "If, therefore, the Central Pacific Railroad Company is not a federal corporation, its most important franchises, including that of constructing a railroad from the Pacific Ocean to Ogden City, were conferred upon it by Congress. * * *
>
> "Of course the authority of Congress over the territories of the United States, and its power to grant

franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing states as well as territories, and employing the agency of state as well as federal corporations."

We are not here considering the question of exemption from taxation of the property of a corporation which has thus received a federal franchise—the sole question is the scope of the franchise so granted.

In the subsequent case of Central Pacific Railroad Company vs. California, 162 U. S., 92, the limitation of this right of taxation has been expressed thus: "The property of a corporation of the United States may be taxed by a state, but not through its franchise."

What we are contending for is, first, that there is in this Act a franchise from the government of the United States to construct, maintain and operate lines of telegraph, and second, that a fair construction of the language of the Act compels the conclusion that it is clearly a grant of the right to do business within the several states as well as between the states, not only for the government of the United States, but for the public.

That such was the intention and understanding of Congress upon the subject is, we think, made very clear by a reference to the debates in Congress when the Act was passed, and, while the language of these debates is not conclusive, it is at least enlightening upon the motives of Congress in passing the legislation.

The legislation leading to the Act of July 24, 1866, originated in the Senate at the first session of the 39th Congress. At that session the question of the expediency of establishing a Government Postal Telegraph was brought before Congress by a resolution of the Senate offered by Mr. Gratz Brown, of Missouri, directing the Committee on Postoffices and Post roads to inquire into the expediency of authorizing the Postoffice Department "to construct and operate telegraph lines along the principal mail routes, and in connection with the postal business to establish offices at such points as

may be determined upon, open at all hours to the public and press for safe and speedy transmission of despatches, under proper regulations, and at fixed minimum rates."

The Senate Committee thereupon reported a resolution, which was passed on February 23, 1866, requesting the Postmaster General to lay before the Senate information in regard to the expediency of establishing, in connection with the Post-office Department "telegraph lines along the principal mail routes for use by the Government, and to be open to the public at minimum rates of charge" (Cong. Globe, part 2, 1st Sess., 39th Cong., p. 979).

Before the report called for by this resolution was laid before the Senate, a bill [which finally became the present Act of July 24, 1866], was introduced by Senator Sherman, of Ohio, to incorporate the National Telegraph Company, with power to construct and operate lines over and along any of the post roads of the United States. In view of the great importance of this measure, the purpose of which, as Mr. Sherman said, was "to organize a company to immediately commence the construction of telegraph lines in the United States on the postal routes," he moved the reference of the bill to a select Committee of five Senators to be appointed by the Chair. This motion being agreed to, the Chair appointed Mr. Sherman (Chairman), Mr. Clark, Mr. Harris, Mr. Brown and Mr. Nesmith, members of the Committee.

A few days afterwards the report of the Postmaster General, on the subject of a postal telegraph, was laid before the Senate, and it was referred on the 4th of June to this Select Committee. This report proved unfavorable to the expediency of connecting the telegraph with the postal service in the manner mentioned in the resolution of the Senate of February 23d.

On the 7th of June Mr. Sherman, from the Select Committee on the bill to incorporate the National Telegraph Company, reported a bill "to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes," which proposed to authorize the National Telegraph Company to exercise the rights and privileges mentioned in the present Act of 1866.

On the 27th of June the Senate resumed the consideration of the bill, when Mr. Grimes, of Iowa, for the purpose of making a general law on the subject of telegraphs, moved an

amendment to the bill by which the words conferring the benefits of the act to the National Telegraph Company were stricken out, and the franchises intended to be granted to that company were conferred upon "*any telegraph company now organized or which may hereafter be organized under the laws of any State of this Union.*"

This amendment was agreed to, and the bill, as amended, after full discussion, passed the Senate. On July 11th it was reported to the House by the Committee on Postoffices and Postroads, and passed that body. The bill was supported and opposed in Congress in the view that the avowed intention and effect of the measures were to make *the erection of telegraph lines on all the postroads of the United States free to all corporations accepting the restrictions and obligations imposed by the act, and for the purpose of furnishing facilities not only for the government but for the entire public as well.*

This appears not only from the debate but from the terms of the Act itself. The evident purpose of the Act was to grant to all telegraph companies then organized and operating the privileges set forth in the Act. These companies were without exception already engaged in doing business for the public, and it was to these companies so engaged that this grant was made; it was evidently intended that they should continue to operate their lines as previously with the additional rights and privileges provided in this legislation. This is further evidenced by the reference therein to the business and the manner of conducting it as set forth in section 2 of the Act, (Section 5266 of the Revised Statutes), which provides that:

> "Telegrams between the several Departments of the Government and their officers and agents in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over *all other business*, at such rates as the Postmaster General shall annually fix. And no part of any appropriation for the several Departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section."

The "all other business" is the business which these companies were engaged in doing for the public, and this had reference not only to interstate business, but to intrastate business as well. Since the decision in the Pensacola telegraph case by Chief Justice WAITE, there never has been any contention that the franchise of the telegraph company accepting the provisions of this Act was not as ample and complete within the boundaries of a state with respect to domestic business as it was with respect to interstate business; the Act makes no reference whatever to any distinction between interstate business and domestic business, and, indeed, as has been very clearly pointed out in the main brief filed in this case, if limited to interstate business, then the act in this respect confers no right whatever upon the company which it did not possess under the decisions of this court by virtue of its right to do an interstate business.

We think it therefore results clearly that with respect to intrastate as well as interstate business under this Act of July 24, 1866, the Western Union Telegraph Company was created an instrumentality of the Federal Government, and endowed with a franchise to construct, maintain and operate telegraph lines on the post roads of the United States, with the duty, in the operation of these lines, to serve not only the Government of the United States under the conditions named in the Act, but also to serve the public which might want to transact business over its lines.

This was done under the power given to the Federal Government to create post-offices and post-roads. The title of the Act expresses that it was for *postal purposes*, and the purposes of the Act show it to have been deemed in amplification of the former methods of postal communication.

If this is so, then clearly an attempt to impose a license tax upon the company, either by the State of Alabama, or by any of its municipalities, is an attempt to require, as a condition to the exercise of this Government franchise within the state, the payment of a tax upon the grant so made by the Government. This is not permissible.

What the city is attempting to do under this ordinance is in no respect to be distinguished in principle from what the State of Massachusetts was undertaking to do in the case of Western Union Telegraph Company vs. Massachusetts, 125 U. S., 530.

In that case, while the particular method of ascertaining the value of the property of the telegraph company in Massachusetts was upheld as a valid and proper method, and therefore the tax held to be valid, yet, the state was undertaking, as a means of enforcing the payment of that tax, to do precisely what the city of Talladega is undertaking to do by its ordinance in the case at bar. The State in that case, as a penalty for non-payment of the tax, entered a decree containing an injunction against the company in the following language:—"that an injunction shall be issued out of and under the seal of this honorable court directed to the said corporation and its officers, agents and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth as aforesaid for taxes as aforesaid shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant within thirty days from the entry hereof."

Mr. Justice MILLER, in delivering the opinion of this court, says:

> "The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company, and defeat all its operations within the state of Massachusetts. The Act of Congress says that the company accepting its provisions '*shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or postroads of the United States.*' It is found in this case that 2334.55 miles of the company's lines out of 2833.05 on which this tax is assessed, are along and over such postroads, and of course the injunction prohibits the operation of defendant's telegraph over these lines, nearly all it has in the state.
>
> If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done. The injunction in this case, though ordered by a Circuit Court of the United States, is

only granted by virtue of section 54 of chapter 13 of the Public Statutes of Massachusetts. If this statute is void, and we think it is, so far as it prescribed this injunction as a remedy to enforce the collection of its taxes by the decree of the court awarding it, the injunction is erroneous.

In holding this portion of section 54 of chapter 13 of the Massachusetts statutes to be void as applicable to this case, we do not deprive the state of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment—executions, sequestration, and any other appropriate remedy in chancery."

In City of Carthage vs. First National Bank of Carthage, 71 Missouri, 508, an attempt was made by the City of Carthage to exact a licence tax from the First National Bank of Carthage under an ordinance reading as follows: "No person or corporation shall be authorized to set up, keep, carry on, or maintain the business of banking, money broker, or exchange dealer, either under or by virtue of the laws of the State or of the United States, nor shall any person or corporation set up, carry on, or maintain any savings association or institute, for the purpose of dealing in exchange or doing a banking or loan business within the limits of the City of Carthage, unless such person or corporation shall first obtain a license from said city as a banker, broker or exchange dealer."

In that case under the tax ordinance a judgment for $100 was rendered for the city of Carthage in the lower court because the bank did not take out a license authorizing it to do business within the city of Carthage. On appeal, the Supreme Court of Missouri held:

"In the case of McCulloch v. The State of Maryland, 4 Wheat., 316, it was held that congress had the constitutional right to authorize the incorporation of banks; that a bank thus incorporated had a right to establish its offices of discount and deposit within any state, and that when so established the state could not

tax it. This decision was made with reference to the question whether the state of Maryland could impose a tax on the Bank of the United States, incorporated under an Act of Congress of April 10, 1816. The principle therein announced has been re-affirmed and applied to the act of congress authorizing the incorporation of National Banks, in the following cases: Van Allen v. Assessors, 3 Wall., 573; Bradley v. People, 4 Wall., 459; Lionberger v. Rouse, 9 Wall., 468; Tappan v. The Bank, 19 Wall., 490; Hepburn v. School Directors, 23 Wall., 480. In all of these cases it has been held that a state can only impose such a tax upon these national banking corporations as is authorized in the act of congress creating them, and that said act only authorizes a tax on the shares in such bank and not upon its capital stock; that such banks derive their authority to do business in the States by virtue of a United States statute which is supreme. It therefore follows that the right of defendant to conduct its business as a banking institution is in no way dependent on a license to be obtained either from the state or any of its municipalities."

In National Bank of Chattanooga vs. Mayor etc. of Chattanooga, 8 Heisk. (Tenn) 814, we have a similar question presented.

NICHOLSON, Ch. J., thus states the case:

"The charter of the City of Chattanooga authorizes its municipal authorities to levy and collect taxes on all privileges taxable by the laws of the state. By section 46 of the act of 1873, chapter 118, it is enacted 'that the occupation and business transactions that shall be deemed privileges and be taxed, and not pursued or done without license are the following,' and among others 'banks and banking.' By this enactment, the occupation of banking is forbidden, except upon license issued, and then it becomes a privilege and subject to taxation. If under this act banking is taxable as a privilege by the state, then the corporation of

Chattanooga had the power to levy the tax complained of.

"We think it manifest that it was not the intention of the Legislature to subject the National Banks to taxation for the exercise of the privilege. To constitute a privilege, the occupation or business transactions must be such that the Legislature could forbid it to be pursued or done, and which could only be pursued or done under license issued by the authority of the state. The National Banks are authorized to pursue their banking business by virtue of acts of Congress. As the Legislature had no power to prohibit the exercise of the privilege so conferred by Congress, it would seem clear that it was not in their contemplation to include National Banks among the privileges to be taxed.

"It follows that the corporate authorities of Chattanooga had no power to tax the First National Bank as a privilege, and that the distress warrant was illegally issued and is void."

A reference to the ordinance under which the prosecution of the plaintiff in error was had in the case at bar will show that it was passed clearly upon the theory that the state or the municipality as its agent had full power to exclude the telegraph company from doing business as described in the ordinance "to and from the city to and from points in the state of Alabama for hire or reward."

With respect to the right of the state thus to exclude, we respectfully submit that the contention which we have made as to the right of the telegraph company as the empowered representative of the government of the United States to do business, not only for the government but for the public as well, is unanswerable and incontrovertible.

Upon the question as to the right of the state or municipality arbitrarily thus to exclude the telegraph company, we call attention to the decisions of this court in the cases of Western Union Telegraph Company vs. Kansas, 216 U. S., 1, and Pullman Company vs. Kansas, 216 U. S., 56.

In the first case the late Mr. Justice HARLAN places the reasoning of his opinion upon the added burden placed upon

interstate commerce by the exaction which the state sought to make, and says, on page 47:

> "The court did not intend by its judgment in the Prewitt case to recognize the right of Kentucky, by any regulation as to foreign insurance companies, to burden interstate commerce or to tax property located and used without its limits. It could not have done so without overruling numerous decisions of this court upon that subject. On the contrary, as we have seen, the court in that case distinctly recognized the principle that a State could not make any prohibition whatever as to a corporation doing business within its limits that would be in violation of the Federal Constitution."

In the concurring opinion rendered in the Pullman case, Mr. Justice WHITE laid down four propositions at pages 65–67, as follows:

> "1. A State may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce. This is so elementary as to require no reference to the multitude of authorities by by which it is sustained.
>
> "2. Even though a power exerted by a State, when inherently considered, may not in and of itself abstractly impose a direct burden on interstate commerce, nevertheless such exertion of authority will be a direct burden on such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on. Darnell v. Memphis, 218 U. S., 113; Am. Steel & Wire Co. v. Speed, 192 U. S., 500, and authorities there cited.
>
> "3. Subject to constitutional limitations, the States have the power to regulate the doing of local business within their borders. As a result of this power, and of the authority which government may exert over corporations, the States have the right to control the coming within their borders of foreign corporations. In cases where this power is absolute the States may affix to the

privilege such conditions as are deemed proper, or, without giving a reason, may arbitrarily forbid such corporation from coming in. * * *

"4. The absolute power of the State, as stated in the preceding proposition, does not include the right to exclude a foreign corporation from doing in a State interstate commerce business, since the regulation of such business is vested by the Constitution in Congress, and the States are impotent, as stated in the first and second propositions, to directly burden the right to do such business or to discriminate against those doing it (Crutcher v. Kentucky, 141 U. S., 47)." * * *

And continuing, on page 68:

"As it is obvious that the Pullman Company, in so far as it was engaged in interstate commerce within the State of Kansas, was independent of the will of the State, it follows that the State had no absolute power to exclude the corporation, and therefore no authority to impose an unconstitutional burden as the price for the privilege of doing local in conjunction with interstate commerce business. The power to exclude in such a case being only relative, affords no warrant for the exertion by the State of an absolute prohibition. That is to say, the exerted power could not in the nature of things be wider than the authority in virtue of which alone it could be called into play. Moreover, to me it seems that where the right to do an interstate commerce business exists, without regard to the assent of the State, a state law which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business, would be a direct burden upon interstate commerce and in conflict with the principles stated in proposition 1. This follows, since the imposition on a corporation which has the right to do interstate commerce business within the State of an unconstitutional burden for the privilege of doing local business is, in my opinion, the exact equivalent of placing a direct burden on interstate commerce business. It is not by me doubted that as a practical question the arbitrary

prohibition against doing a local business imposed on one engaged in and having the right to engage in interstate commerce is to burden that business."

Examined in the light of the principles announced by Mr. Justice WHITE in this leading decision of this court upon the subject, this ordinance of the city of Talladega must wholly fall. It is clear that the Pullman Company, as an instrumentality of interstate commerce, had no higher or greater rights to do business both local and interstate in the State of Kansas as an agency of interstate commerce than the telegraph company has in the State of Alabama under the direct authorization of the Government of the United States as announced by the Act of July 24, 1866 and the acceptance thereof; not only has the telegraph company as an instrumentality of interstate commerce all the rights defined by Mr. Justice WHITE as "inherent" in the Pullman Company, but it has also the added right conferred by the Act of July 24th, 1866. Therefore the burden placed upon the telegraph company by this ordinance for the privilege of doing that business in addition to the tax upon its property, comes within the definition given by Mr. Justice WHITE of the "burden" upon interstate commerce which the telegraph company is engaged in doing.

The extent of the burden as shown in the main brief in this case is indeed admitted by the Supreme Court of Alabama, when it is seen that the amount demanded for the license is a confiscation by the city of all the net revenue accruing to the telegraph company as a result of its operations in intrastate business within the city of Talladega (Record, page 35).

The Ordinance Cannot be Sustained as an Act Coming Within the Police Power of the City of Talladega.

The ordinance cannot be sustained as an exercise of the police power to reimburse the city for the expense incurred in the inspection and protection of its citizens against injury within the doctrine of the case of Western Union Telegraph Company vs. New Hope, 187 U. S., 419, and Atlantic, etc., Tel.

Co. vs. Philadelphia, 190 U. S., 160, or Postal Telegraph Co. vs. Taylor, 192 U. S., 64, because the uncontradicted evidence shows that no expense whatever was incurred in the way of police inspection or supervision (Record, page 23).

It is to be noted that the Supreme Court of Alabama does not in any way refer to this exercise of the police power in support of the conclusion at which it arrives, and this element may therefore be entirely eliminated from the case.

The Supreme Court of Alabama thus states the question upon which it passes:

> "The question then is whether the act to which reference is made was intended to confer a franchise upon the Western Union, and other companies accepting its provisions, to carry on an intrastate business in such a way as to put it beyond the power of the state to impose a privilege or license tax upon it. This involves a question of Federal Constitution and law, and if it has been determined by the Supreme Court of the United States, that determination must be final so far as we are concerned. We have already quoted the Supreme Court of the United States to the effect that, as to government business, the telegraph company is a government agency. As a summing up of a number of its own decisions it was said by that court in Western Union Telegraph Company v. Alabama, 132 U. S., 472, that the principle in regard to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866, is 'that they shall not be taxed by the authorities of a state for any messages, or receipts arising from messages, from points within the state to points without or from points without the State to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the state.' There was consideration of the interstate commerce clause, because that too was involved; but the conclusion of the case, and that of the cases cited, could not have been reached except on the theory that the argument here made is not grounded in a correct appreciation of the force and effect of the Act of Congress in relation to telegraph companies."

The Supreme Court of Alabama then proceeds to consider the cases in this court respecting taxation and concludes that the state has unlimited power to tax all messages sent from one place to another exclusively within its own jurisdiction, evidently considering and viewing the whole case simply as a question of taxation upon the property of the company.

The answer to this conclusion is that in the cases referred to the precise contention now made in this case was not presented to this Court. Those cases dealt with the right of taxation of the property of the company. This case deals with the right to do business. The record and the agreed statement of facts shows that the telegraph company pays taxes on its lines and other property within the state at a valuation fixed by the state board of assessors, and that the amount of such tax for the year 1907 was $17,182.12,—presumably a tax based upon a fair valuation of the property as all other property is taxed within the state.

The ordinance itself shows that this is not like some of the other cases which have been before this court and sustained upon the ground that the tax was in lieu of all other property taxes and therefore a fair method of the taxation of the property itself; the third section of the ordinance makes it perfectly clear that the tax is for the privilege of engaging in or carrying on the "trade, business, profession or vocation" and is based upon the theory that the city has absolute power to prohibit the carrying on of such trade, business, profession, calling or vocation, except upon the compliance by the person or corporation with the conditions which the city might fix, and not that it is a method of securing a tax upon the property of the person or corporation carrying on the business. Indeed, the Supreme Court of Alabama is unable to escape this conclusion, because after the conclusion which we have referred to in the latter part of the opinion, it proceeds:

> "The ordinance imposes a tax for the privilege of transmitting messages between the city of Talladega and points within the state" (Record, p. 34).

That the fee demanded by the city of Talladega under this ordinance is in no respect a tax upon property, is quite evident from an examination of the statutes of Alabama, defining the powers of municipal corporations, and under which powers

the City of Talladega passed the ordinance in question. This statute quite clearly distinguishes between a tax upon property and a license to carry on business.

Thus, we have in the "Political Code," under "Municipal Corporations," the following sections among others:

ARTICLE 23, TAXATION. 1311–1337:

"1311. LEVY AND ASSESSMENT OF MUNICIPAL TAXES. After the 1st day of October of each year, cities and towns may levy taxes upon property and all subjects of taxation liable therefor, at a rate not in excess of the constitutional limit, upon assessments to be made by the city or town clerk, or other person designated by the council, such assessments to be made on the state assessment in the manner provided by the constitution of the state, or in the manner hereinafter authorized by law. After the assessment has been made, it shall be returned to the council, which shall thereupon give ten days' notice, by publication in a newspaper published in the city or town, or if no newspaper is published in such city or town, then by posting notices in three or more public places in such city or town, that the assessment has been completed and that the council will hear and determine objections thereto upon a day not more than thirty days from the date on which said notice was directed to be made; the council may, however, authorize such assessment to be made by a board of assessors, who, when the assessment has been completed, shall give a similar notice that such board will hear and determine objections to the assessment at a time and place designated in such notice, not more than thirty days thereafter. On the day set for the hearing of objections, the council or board, as the case may be, shall hear such objections and determine the assessment.

"1314. TAXES; LIEN OF. Cities and towns shall have a lien for taxes upon all property assessed for taxation, which shall be superior to all other liens, except for taxes held by the state and county.

"1315. TAX SALE; TITLE OF. The purchaser of personal property sold under an execution issued by the city or town clerk, shall receive a title clear of all

encumbrances, except the liens held by the state and county.

"1317. UNKNOWN OWNERS; SALE OF PROPERTY. When property, other than real, is assessed to an unknown owner, the taxes due may be collected by a levy of execution upon such property and a sale thereof.

"1318. TAXES; DEMAND FOR PAYMENT. Cities and towns may provide for a personal demand of taxes due, and are authorized to make a charge therefor, not exceeding fifty cents, to be paid as costs, but such demand shall not be necessary or essential to the validity of proceedings to make collection by law."

We have reproduced only enough of the sections to show that the legislature had very clearly in mind in this article the power of municipalities to levy taxes upon the property to be taxed within the limits of the municipalities.

Article 24 of the "Political Code," on the other hand, deals with licenses to carry on business, trades, etc., and we quote the following sections therefrom:

"ARTICLE 24. LICENSE TO CARRY ON BUSINESS, TRADES, ETC. 1338–1347.

"1338. LICENSE TO AUCTIONEERS, SALES OF GOODS, ETC. Municipal corporations shall also have the following powers: To regulate auctioneering and to regulate, license, or prohibit the sale at auction of goods, wares and merchandise, or of live domestic animals in the streets or public places of the town or city, and to regulate, license or prohibit the selling of other goods, wares, merchandise, or medicines on the streets of such town or city.

"1339. LICENSE TO BUSINESS, TRADE, PROFESSION, ETC. To license any exhibition, trade, business, vocation, occupation or profession not prohibited by the constitution or laws of the state, which may be engaged in or carried on in the city or town; to fix the amount of licenses, the time for which they are to run, not exceeding one year, and provide a penalty for doing business without a license, and to charge a fee of not

exceeding fifty cents for issuing each license; to require sworn statements as to the amount of capital invested, or value of goods or stocks, or amounts of sales or receipts where the amount of the license is made to depend upon the amount of capital invested, or value of goods or stocks or amount of sales or receipts, and to punish any person or corporation for failure or refusal to furnish sworn statements or for giving of false statements in relation thereto. The license herein authorized as to persons, firms, or corporations engaged in business, in connection with interstate commerce, shall be confined to that portion within the limits of the state and where such a person, firm or corporation has an office or transacts business in the city or town imposing the license.

"The power to license conferred by this article may be used in the exercise of the police power as well as for the purpose of raising revenue, one or both.

"1344. LICENSE; UNLAWFUL TO ENGAGE IN BUSINESS WITHOUT. It shall be unlawful for any person, firm or corporation, or agent of a firm or corporation, to engage in any of the businesses or vocations in a city for which a license may be required without first having procured a license therefore, and any violation of this article or of any ordinance passed hereunder, fixing a license, shall be punishable by such fine as may be fixed by ordinance not to exceed the sum of one hundred dollars for each offense, and by imprisonment not exceeding six months, either or both, at the discretion of the court trying the same, and each day shall constitue a separate offense."

The foregoing sections relating to licenses leave no manner of doubt as to the fact that the legislature, in enacting these sections, was proceeding upon the theory that it was not thereby creating a tax upon property, but was imposing a payment as a condition for the exercise of the privilege of doing business within the municipality, which without the performance of such condition, it had a perfect right to prohibit.

There is no claim by the telegraph company that its property within the city of Talladega is in any respect exempt

from taxation. The license tax sought to be enforced by this proceeding is not in lieu of any tax imposed by the laws of Alabama upon the property of the telegraph company, but is in addition thereto, and is purely and simply a tax for the privilege of doing business, measured by no just standard, wholly arbitrary, and presupposes the right to exclude the telegraph company from the city of Talladega unless the tax is paid.

The Supreme Court of Alabama in its opinion has sustained the right of the city of Talladega to demand as a price for this privilege the entire value of the use of the property for intra-state business for the year in question, and if the City of Talladega may exact such a tax, then every other village, town or city in the United States may do so, and the telegraph company may be compelled to pay as a condition for doing local business every dollar of net revenue which it may receive from that business.

As it might be considered by this court, as it was by the Supreme Court of Alabama, that this case concerns only one city, and the revenue for this particular year, and that therefore it is a matter of inconsiderable importance, we beg to say, (entirely *dehors* the record in this case), that the issues herein are of the greatest importance to the telegraph company.

We have made a careful examination and compilation of the effects of similar ordinances in four of the states where such ordinances have been passed on the same basis as this Talladega ordinance, and find that for the year 1912, in the state of Alabama, if such licennse had been required at all the offices within the state at the average fee demanded where such ordinances have been passed, the total license fees in the state would have amounted to $10,542.05, whereas the entire net receipts from intra-state business, including government business, amount to only $8,589.25, leaving $1,952.80 of these license fees to be paid out of receipts from interstate business.

In the state of Georgia the entire license fees upon the same basis would have been $15,404.52, whereas the net receipts from intra-state business, including government business, were only $13,325.48, leaving $2,079.04 to be paid out of the receipts from interstate business.

In South Carolina, the amount of license fees would have been $11,346.14, while the entire net receipts from intra-state

and government business were $10,085, leaving a deficit of $1,261.23 to be paid out of receipts from interstate business.

In Virginia the amount of license fees would have been $16,242.14, while the net receipts from intra-state and government messages were $15,452.70, requiring a payment of $789.44 from the receipts for interstate business.

If license fees at the average rate obtaining in these four states for the year 1912 had been applied in all the states of the Union at cities, town and villages where offices are maintained by the telegraph company, the total license fees would have amounted to $659,973.60 in addition to all other taxes now paid.

There is no exclusion from the ordinance of the right to do government business within the state, and the right to transact such business is likewise clearly within the prohibitions of the ordinance until the telegraph company has paid the amount demanded.

The point at issue comes squarely within the distinction announced by this court in Railroad Company vs. Peniston, 18 Wall., 5, the first syllabus of which reads as follows:

> "The exemption of agencies of the Federal Government from taxation by the States is dependent, not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power. A tax upon their *property* merely, having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the States. A tax upon their *operations* being a direct obstruction to the exercise of Federal powers may not be."

In Neill, Moore & Co. vs. State of Ohio, 3 How., 720, we have a case growing out of the abandonment of the Cumberland Road and the contract between the Government of the United States and the states through which the road was built. It was sought to tax each passenger carried in the mail

coach notwithstanding the contract with the Federal Government providing that the mail coach should pass free of toll. The Supreme Court of Ohio maintained the validity of the statute imposing the tax, and the case came to this Court, and Mr. Ewing, counsel for plaintiff in error, after referring to the duties of the contractor, said:

> "The compensation paid for carrying the mail is fixed with a view to these duties and conditions, and any tax or toll levied on a contractor on account of passengers, by so much lessens his compensation, or it compels the department to increase it to an equivalent amount. Nay, if such toll may be levied, it enables a state, at pleasure to prohibit the transportation of passengers in all mail coaches, and thus take away its greatest safeguard. * * * The transportation of the United States Mail is a substantive power in Congress, to which the establishment of post roads, though specially granted by the constitution, is but an incident; for it can be only with a view to the transportation of the mail that Congress could use the power to establish post roads, and the passage of the mail in the coach along the post road, with the horses which move it, and the drivers who guide, and the passengers, or guards who protect it from violation, are, to borrow the language of the court in McCullough vs. Maryland, which is repeated by Chief Justice MARSHALL, in Weston vs. City of Charleston, 2 Pet., 46, 'those means which are employed by Congress to carry into execution the power conferred on that body by the people of the United States,' and 'the attempt to use the power of taxation' or the levying of tolls 'on the means employed by the government of the union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give'; for 'the states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.'

"The right to tax these contracts for the transportation of the mail must operate upon the contractors before they make their bids, and thus have a sensible effect upon the contracts. If this power be allowed to exist at all, in this case, 'its extent depends upon the will of a distinct government. It may be carried to an extent which will arrest them entirely'."

Mr. Chief Justice TANEY, on page 741, says:

"The reason of this exemption is evident; for a toll charged upon the carriages of the contractors would, in effect, be a charge upon the Post Office Department, since the contractor would be obliged to make provision for this expense when bidding for the contract, and regulate his bid so as to cover it."

And again, on page 743:

"And although this toll, in form, is laid upon the passengers and not upon the vehicle, the result is the same; for in either case it is, in effect, a charge upon the proprietor of the carriage, diminishing his profits in that portion of his business; and when thus levelled exclusively at passengers in the mail stage, it accomplishes indirectly what evidently cannot be done directly by a toll upon the carriage, and in its consequences must seriously affect the interests of the United States. For in bidding for a contract upon a road so much travelled as this, the bidder would undoubtedly be greatly influenced by the advantages which a contract would give him in the conveyance of passengers, as his carriage, when carrying the mail, are entitled to go free. But if they, and they alone, are to be subjected to this burdensome and unequal toll, it is obvious that he must seek to reimburse himself, by enlarging his demand upon the government. Indeed, if this system of levying toll can be sustained, the mischief may not stop here; and it will be in the power of any one of the states through which the road passes so to graduate the tolls as to drive all passengers from the

> mail stages into other lines, and by that means compel the United States, contrary to their wishes, and contrary to the public interest, to transport the mails in vehicles in which no passengers would travel."

If the city of Talladega, under an ordinance like the one in question, can demand all the net revenue of the telegraph company as a consideration for the privilege of doing business with other points within the state, it is clear that the offices now maintained in the State of Alabama for both interstate and intrastate business may in time be required to be supported wholly by the interstate commerce business. The telegraph company may be required to abandon many of the offices now maintained, thus depriving the government of many of the facilities now available to it, and which have been constructed and operated by the telegraph company under the Act of Congress of July 24, 1866, and the telegraph company may be compelled to abandon the transaction of all business except interstate business within the state of Alabama except upon the confiscatory terms and conditions established by the cities of that state. This would be a direct denial of the right of Congress in the exercise of its right to establish post-offices and post roads, to establish this postal agency and to enable the telegraph company to become the instrumentality of the government in furnishing telegraphic facilities to the various departments of the Government and to the public.

The judgment of the Supreme Court of Alabama should, therefore, be reversed and wholly set at naught.

Respectfully submitted,

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JOHN F. DILLON,
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APPENDIX.

THIRTY-NINTH CONGRESS. SESS. 1. CHAP. CCXXX.—*An Act to aid in the Construction of Telegraph Lines and to secure to the Government the Use of the same for postal, military and other Purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled: That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by act of Congress; and over, under or across the navigable streams or waters of the United States. Provided, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of telegraph; and may preempt and use such portion of the unoccupied public lands subject to pre-emption, through which its said lines of telegraph may be located, as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

SEC. 2. *And be it further enacted*, That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

SEC. 3. *And be it further enacted*, That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person; *Provided, however*, That the United States may at any

time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

SEC. 4. *And be it further enacted*, That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this act.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

NO. 44.

D. G. WILLIAMS, *Plaintiff in Error,*

vs.

THE CITY OF TALLADEGA, *Defendant in Error.*

BRIEF OF GEO. H. FEARONS, F. N. WHITNEY, RAY RUSHTON AND WM. M. WILLIAMS, FOR PLAINTIFF IN ERROR.

BROWN PRINTING COMPANY, Montgomery, Ala.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

NO. 266.

D. G. WILLIAMS, *Plaintiff in Error,*

vs.

THE CITY OF TALLADEGA, *Defendant in Error.*

BRIEF OF GEO. H. FEARONS, F. N. WHITNEY, RAY RUSHTON AND WM. M. WILLIAMS, FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to review a judgment of the Supreme Court of Alabama, affirming a judgment of the City Court of Talladega, where D. G. Williams, plaintiff in error, as agent of the Western Union Telegraph Company, was convicted, under a city ordinance, of doing a telegraph business in the City of Talladega without a license.

The principal defenses relied upon by the plaintiff in error were that prior to the times charged in the complaint the Western Union Telegraph Company had accepted and was then doing business under the provisions of an Act of Congress, approved the 24th day of July, 1866, and entitled "An Act to aid in the construction of telegraph lines, and to secure to the Government of the United States the use of the same for postal, military and other purposes"; that the license provided for by the ordinance was for rev-

enue and not for police regulation or inspection, and for that reason was illegal as to a telegraph company that had accepted the Act of 1866; that the amount of the license, as fixed by the ordinance, was unreasonable and, for that cause, void.

The case was originally tried in the City Court of Talladega, without a jury, on an agreed statement of fact, with the privilege to either party to introduce further evidence. Some further evidence was introduced, as hereinafter shown. The agreed statement of fact was, in substance, as follows (Rec. pp. 18-19):

In 1908 the City of Talladega passed an ordinance requiring each person, firm or corporation commercially engaged in the business of sending messages to and from the City of Talladega to and from points in the State of Alabama to pay a privilege tax of $100.00 per annum; that in November, 1908, the City of Talladega demanded of the plaintiff-in-error, as manager of the office of the Western Union Telegraph Company at the City of Talladega, $25.00, alleged to be due on that date as a license for the months of October, November and December, 1908, which license the plaintiff-in-error and his employer refused to pay, claiming that it was unreasonable and confiscatory, and upon such refusal plaintiff-in-error was arrested and convicted in the mayor's court; that the plaintiff-in-error during the months of October, November and December, 1908, was employed by the Western Union Telegraph Company as the manager of its office in the City of Tallageda; that the plaintiff-in-error's employer, the Western Union Telegraph Company, was at the times mentioned therein a corporation organized and existing under the laws of the State of New York and was at such times, pursuant to its charter, engaged in the business of a telegraph company in the different States of the Union and in the State of Alabama, and had complied with all requirements of law authorizing it to do business in the State

of Alabama, and on June 5, 1867, had accepted and had since continuously been and was at the times mentioned in the complaint acting under the provisions of the Act of Congress, approved the 24th day of July, 1866, and entitled, "An Act to aid in the construction of telegraph lines and to secure to the Government of the United States the use of the same for postal and military purposes"; that by such acceptance the company assumed the restrictions and burdens imposed, and became entitled to the benefits granted by that Act; that for some time past it had an office in the City of Talladega and was, during the year 1908, engaged in the business of transmitting messages between private parties and the departments and agencies of the United States Government from Talladega to other points in the State of Alabama, and also from other points in the State of Alabama to Talladega; that the lines and poles of the company within the City of Talladega were in and over the rights of way of public railroads and public highways; that the City of Talladega had duly adopted the ordinance above mentioned; that the Western Union Telegraph Company pays taxes on its lines and other property in the State at a value as fixed by the State Board of Assessment; that it had paid to the State of Alabama $4,237.15 as taxes for the year 1907; that the population of the City of Talladega, according to the census of 1900, was 5,056, and that the estimated population of the City of Talladega on the first day of January, 1908, was approximately 7,500.

It was admitted that the rates charged on government messages are reduced rates, fixed by the Postmaster General of the United States and that such rates were charged on Government messages sent and received during the times mentioned in the complaint (Rec. p. 23).

The uncontradicted testimony shows that there was expended at the Talladega office by its manager, during the months of January, February, March, April, May, and

June, 1908, the sum of $549.83 (Rec. p. 20); during the months of July, August and September, 1908, the sum of $265.91 (Rec. p. 21); during the months of October, November and December, the sum of $289.83 (Rec. p. 21); making a total for the year of $1,105.57; that in addition to the foregoing amounts, there was expended for the operation of the office for the year 1908, the following sums: Superintendence, $130.00; stationery, $30.00; battery supplies, $63.00; maintenance of its lines and batteries, $600.00, making a total of $1,928.57 for all expenses (Rec. pp. 23-24). Among the items of expenses for the month of June were two items of $10 each, to which the defendant-in-error objected. We will omit those items.

Witness DuBose, sworn on behalf of defendant, when asked the amount of receipts on intra-state messages for the month of January, 1908, was not permitted to testify, against an objection on the ground that it was not shown that the witness knew of her own knowledge, and that her original record was not introduced. As a predicate for the question the witness testified that she had looked for the original record; that she had been unable to find it; that she had looked in the place where it was usually kept; that the last time she saw it, it was in a pigeon hole in the desk where she kept such records, and that she had looked in that pigeon hole for it (Rec. p. 20). The objection was sustained, and the defendant excepted. As a further predicate for the question, defendant introduced the auditor of the Western Union Telegraph Company for the purpose of showing that it was a rule of the company to destroy all records after eight months. The auditor testified that he knew the rule and had himself instructed the offices concerning the same (Rec. p. 20). The objection was sustained, and the defendant excepted. (Rec. p. 20).

The testimony shows without contradiction that the receipts on *intrastate* messages for the months of February,

March, April, May and June, 1908, amounted to $217.05 (DuBose, Rec. p. 20); for the months of July, August, and September, $120.49 (Barlee, Rec. p. 21), and for the months of October, November and December, 1908, $128.16 (Williams Rec. p. 21), making a total for eleven months of $465.70; that the total receipts for the office during the year 1908 for both interstate and intra-state messages amounted to $2,190.50; and that the receipts on messages received "collect" and messages sent "collect" about balance (Williams, Rec. p. 22); and that during the times mentioned in the complaint Government messages, both interstate and intrastate, were actually received and sent by the plaintiff in error (Rec. p. 22).

The testimony further showed that during the year 1908 nothing was expended by the City of Talladega for police regulation or inspection of the company's property in the City of Talladega (Coker and Bowie, Rec. p. 23).

Upon the foregoing agreed facts and testimony, in which there is no conflict, the Court adjudged the plaintiff-in-error guilty of doing a telegraph business without a license, and on appeal to the Supreme Court of Alabama the judgment of the trial court was affirmed.

SPECIFICATION OF ERRORS RELIED UPON.

(1) That the Supreme Court of Alabama erred in affirming the judgment of the City Court of Talladega.

(2) That the Supreme Court of Alabama erred in not reversing the judgment of the City Court of Talladega.

(3) That the Supreme Court of Alabama erred in affirming the judgment of the City Court of Talladega convicting plaintiff in error of doing an intrastate telegraph business in the City of Talladega without a license.

(4) That the Supreme Court of Alabama erred in affirming the judgment of the City Court of Talladega convicting the plaintiff in error of sending and receiving in-

trastate telegrams in the City of Talladega without first obtaining from the City of Talladega a license so to do.

(5) The Supreme Court of Alabama erred in not sustaining the defense of the plaintiff in error specially claimed and set up by him under the Act of Congress passed the 24th day of July, 1866, entitled, "An Act to aid in the construction of telegraph lines and to secure to the Government of the United States the use of the same for postal, military and other purposes."

(6) The Supreme Court of Alabama erred in its construction of the Act of Congress passed the 24th day of July, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the Government of the United States the use of the same for postal, military and other purposes," in holding that the said Act does not confer on the Western Union Telegraph Company the right to do an intrastate telegraph business so as to exempt it from payment of the license imposed by the City of Talladega for purposes of revenue and not for police regulation or inspection.

(7) The Supreme Court of Alabama erred in failing to declare the license ordinance of the City of Talladega invalid, because it did not exclude messages sent on United States Government business within the State of Alabama.

(8) The Supreme Court of Alabama erred in not reversing the judgment of the City Court and failing to declare unreasonable the ordinance adopted by that City, imposing a license tax of $100.00 per annum on telegraph companies doing an intrastate telegraph business.

POINTS.

I.

THE FRANCHISE OF THE COMPANY TO DO BUSINESS IN THE CITY OF TALLADEGA IS DERIVED SOLELY FROM THE FEDERAL CONGRESS, AND IS THEREFORE NOT TAXABLE BY THE CITY FOR PURPOSES OF REVENUE.

On the 24th day of July, 1866, Congress, pursuant to the authority and power conferred upon it by the Constitution of the United States to establish post roads, enacted a law, entitled, "An Act to aid in the construction of telegraph lines and to secure to the Government of the United States the use of the same for postal, military and other purposes" (Fed. Ann. St. Vol. 7, pp. 205-213).

The purpose of this act was to secure to the Government of the United States preferential and economical use of the lines of telegraph companies, and to secure the right to purchase and own the said telegraph companies, pursuant to the terms of that act.

> Western Union Tel. Co. v. Texas, 105 U. S. 460 (26 L. ed. 1067, at p. 1068).

Among the provisions of this Act is the following:

> "That any telegraph company accepting the said Act shall have the right to *construct, maintain and operate* its lines of telegraph through and on any portion of the public domain of the United States, on and along *any* of the military and post roads of the United States which have been or may hereafter be constructed by Act of Congress."

The Western Union Telegraph Company, on or about the 5th day of June, 1867, filed its written acceptance, and thereby assumed the burden of all the restrictions and became entitled to all of the benefits and privileges conferred by the Act (Western Union Tel. Co. v. Texas, 105 U. S. 460 (26 L. ed. at p. 1068), pursuant to the terms of which the defendant, as manager of the company's Talladega office was doing business at the times mentioned in the complaint and when arrested (Rec. pp. 18-20).

In 1872 Congress passed an Act (Fed. Ann. Stat. Vol. 5, p. 900), among the provisions of which is the following:

> "The following are established post roads:
> "All railroads or parts of railroads, which are now or may hereafter be in operation. * * *

And in 1884, Congress passed another law, as follows (Fed. Ann. Stat. Vo. 5, p. 901):

> "That all public roads and highways while kept up and maintained as such are hereby declared to be post-roads."

The record shows that in the case at bar, the lines of the Company, in the City of Talladega, are on the rights of way of railroads or on public roads and highways.

POWER OF CONGRESS.

CONGRESS HAS THE POWER TO GRANT A FRANCHISE TO DO AN INTRA-STATE AS WELL AS AN INTER-STATE TELEGRAPH BUSINESS ON THE POST ROADS OF THE UNITED STATES.

It is well settled, and it is not denied by the City of Talladega, that Congress has the power to grant a fran-

chise to do an inter-state telegraph business, and that a license tax upon such business under a municipal ordinance is invalid.

> LeLoup v. Port of Mobile, 127 U. S. 640 (32 L. ed. 311, 314).
> Western Union Tel. Co. v. Texas, 105 U. S. 460.
> Western Union Tel. Co. v. Atty. Gen. of Mass., 125 U. S. 530.

The ordinance under which the license is imposed in this case does not attempt to cover inter-state business, and we are, therefore, concerned only with intra-state business,—messages sent between the City of Talladega and other points within the State of Alabama (Rec. p. 15).

A review of the decisions of the United States Supreme Court in telegraph cases where the Act of 1866 was under consideration will show that in all of them, but one, that we have found, the question of *licensing* intra-state business was before the Court only as it involved inter-state business. The only case in this Court, that we have found, in which intra-state business was considered apart from inter-state business was *Postal Tel. Co. v. Charleston*, 153 U. S. 691 (38 L. ed. 871).

In these cases it was urged that the license was invalid on two grounds, viz.:

(1). An interference with inter-state business.

(2). That the privilege was granted by the Federal Congress, and therefore not taxable by a municipality.

These decisions, it will be noticed, were on the ground that a tax burdening the interstate business of a telegraph company was an interference with interstate commerce. The principle of noninterference with interstate commerce by State legislative action having been so well established by Mr. Chief Justice Marshall in Brown v. Maryland, 25 U. S. (12 Wheat.) 419 (25 L. ed. 678)—dis-

cussed *infra*—and supported by a long line of decisions, it was an easy matter for the courts, guided by those cases, to decide the telegraph cases *on the interstate commerce theory*, without going much into the second defense, i. e., that the privilege to do a telegraph business is granted by the Federal Congress *to all* companies accepting the Act of 1866.

So, when the question of licensing an *intra-state* telegraph business was FOR THE FIRST TIME squarely presented to the United States Supreme Court, without *inter-state* questions being involved, in the *Charleston Case*, *supra*, the Court was misled on the theory of *Interstate Commerce*. After stating the facts in that cause the Court contented itself by saying:

> "The questions suggested have been so frequently and so recently considered and decided by this Court, in well known cases, that our duty will be sufficiently performed by briefly citing and applying those cases."

There are some *dicta* in the cases cited in the *Charleston* case, and upon which that decision rests, to the effect that a tax on intra-state business is valid; but the question as to whether or not a State or a municipality may impose a license tax on the mere *privilege* of doing a telegraph business by a company that has accepted the Act of 1866 was not decided in any one of them.

The cases cited in the *Charleston* case are as these:

In *Home Ins. Co. v. Augusta*, 93 U. S. 122; *License Tax Cases*, 72 U. S. 5 Wall. 462; *and Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 376, neither the power of Congress relating to post roads nor commerce was involved. They were licenses imposed on businesses which claimed no right from Congress.

Western Union Tel. Co. v. Mass., 125 U. S. 530, decided nothing more than that *the personal and real property*

of a telegraph company within a state is subject to state taxation. No tax was sought to be imposed upon the company's franchise.

Le Loup v. Mobile, 127 U. S. 640, was decided solely on the theory of non-interference with inter-state commerce. The Court said:

> "We have decided that communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different states, it is commerce among the several states, and directly within the power of regulation conferred upon Congress, and free from the control of state regulations."

Western Union Tel. Co. v. Texas, 105 U. S. 460, was also decided purely on the inter-state commerce theory. It was shown that more than 5,000 miles of the Company's lines in the State of Texas were not on "post roads," and for that reason the Company was not entitled to the benefits of the Act of 1866.

In *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, it was expressly stated that the Company could not claim the benefits of the Act of 1866, because the lines of the Company were not shown to be on "post roads." The Court said:

> "In the present case counsel for the Telegraph Company have argued that this statute (Act 1866) secures the corporation from taxation of any kind whatsoever, and especially as to receipts arising from messages sent over its lines; but that question does not arise in this action, because there is no allegation or averment, within the bill itself or in the statement of facts, that any part of the lines of the telegraph company in the State of Ohio is built over or along a post road." * * *

"The only reference to this subject is in the following allegation of the bill: 'That prior to 1869 your orator accepted in writing the provisions of the Act of Congress of July 4, 1866, 14 U. S. St. at L. 221.' Under this allegation the complainant can, of course, claim no benefit from the provisions of that section, for it does not appear that any part of the company's lines comes within the description of this section of the Revised Statutes."

Philadelphia R. R. v. Penn., 15 Wall. 232 (21 L. Ed. 146), was decided solely on the theory of inter-state commerce, and the Act of 1866 was not involved.

In *Western Union Tel. Co. v. Scay*, 132 U. S. 472 (33 L. ed. 409) inter-state as well as intra-state messages were involved, but the Court did not consider the Act of 1866 and the case was decided solely on the commerce theory, as is evidenced by the following language of the Court:

"The foundation of this principle is that messages of the former class are elements of commerce between the States and not subject to legislative control of the State, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the State and, therefore, subject to its taking power."

Pacific Exp. Co. v. Seibert, 142 U. S. 339 (35 L. ed. 1035), was also decided solely on the inter-state commerce theory, and the Act of 1866 was not involved.

To properly apply the law to the facts in the case at bar, we must keep in mind that among the enumerated powers that the constitution of the United States gives to Congress, are the following, which said powers are separate and independent (Art. I, Sec. 5):

(1). "To regulate commerce * * among the several states." * *

(2). "To establish postoffices and post roads."

And besides the foregoing, there is the general power (Const. U. S., Art. I, Sec. 5): "To make all laws which shall be necessary and proper for carrying into execution the following powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Therefore, under the power "to establish postoffices and post roads," and the power to make "all laws which shall be necessary to carry into execution" the first mentioned power, we submit that the Act of 1866, and the other Acts above quoted, were necessary and proper for carrying into execution the power of Congress to establish post roads, and that the Act of 1866 grants to the telegraph companies, accepting its provisions, the privilege to do an *intrastate* as well as an *interstate* business."

A proper decision of the case at bar will not involve the power of Congress "to regulate commerce."

The Supreme Court has firmly established the principle that Congress has the power to grant a franchise to be used as a "necessary and proper" instrumentality of the Government, and when so used a general business may be done under that franchise, free from license imposed by states and municipalities.

> McCulloch v. Maryland, 4 Wheat. (U. S. 316.
> Osborn v. Bank of U. S., 9 Wheat. (U. S.) 378.

In *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, where the State of Maryland by statute imposed a license tax on a United States Bank, and the power of Congress to establish a bank and the power of the state to impose a license tax were discussed, Chief Justice Marshall, speaking of what laws Congress might pass as "necessary and proper" to carry into effect the powers of Con-

gress, and holding that a bank as thus established is an instrumentality of the Government, and that Congress not only had the power to grant the franchise but that business might be done under it without State interference, said:

> "Does it ('necessarily') always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without the other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as implying any means calculated to produce the end, and not as being confined to those means, without which the end would be entirely unattainable." * * *
>
> "This word, then like others, is used in various senses; and in its construction the subject, the context, the intention of the person using them, are all to be taken in view.
>
> "Let this be done in the case under consideration. *The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to have it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end.*
>
> "We admit, as all must admit, that the powers of Government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national

legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional. * * *

"*Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its accessity would be to pass the line which circumscribes the judicial departments and to tread on legislative ground.* This Court disclaims all pretense to such a power."

Therefore, we submit, that apart from the inter-state commerce theory, Congress in its legislative function to enact such laws as Congress *alone* may deem "necessary and proper" to carry into execution its powers, may grant a franchise to do an intra-state as well as an inter-state telegraph business.

Under the principle established in the *McCulloch* and *Osborn cases (supra)*, the Supreme Court of the United States has repeatedly held that the Act of 1866 is appropriate legislation, as "necessary and proper" for the execution of the power of Congress relating to "post roads."

In *Pensacola v. Western Union Tel. Co.*, 96 U. S. 1, the Court said: "The Act of 1866 "is appropriate legislation to carry into execution the powers of Congress over the Postal Service."

In *Western Union Tel. Co. v. Texas*, 105 U. S. 460, the Court, referring to companies that had accepted the terms of the Act of 1866, said: "Thus, as to government busi-

ness, companies of this class become government agencies."

In *Western Union Tel. Co. v. Mass.*, 125 U. S. 530 (31 L. ed. 790, at p. 795), the Court said:

> "If Congress had authority to say that the Company might construct and operate its telegraph over these lines (Post Roads), *as we have repeatedly held it had*, the State can have no authority to say it shall not be done."

In *Stockton v. Baltimore Railroad Co.*, 32 Fed. 9, the Court said (p. 14):

> "At all events if Congress in the execution of its powers chooses to employ the intervention of a proper corporation, *whether of the State or out of the State*, we see no reason why it should not do so."

In *San Francisco v. W. U. Tel. Co.*, 91 Cal. 140, an action to recover a tax levied on the telegraph company's franchise, the Court holding such franchise not taxable because of the company's acceptance of the Act of 1866, said (p. 143):

> "It is contended by the appellant that the attempt to tax its franchise * * * is an attempt to tax 'the operation of an instrument employed by the Government of the Union to carry its powers into execution, within the meaning of the decision in McCulloch v. Maryland, 4 Wheat. 316 * * * (p. 145 * * * if it is entirely clear that if the appellant is an instrument of the National Government, within the meaning of McCulloch v. Maryland, 4 Wheat, or has franchises granted by that government for national purposes, then the tax involved in the case at bar cannot be maintained. * * * Are the relations of ap-

pellant to the National Government and its franchises derived therefrom of such character as to bring it within the principles of the cases cited above? We think that the decisions of the Supreme Court of the United States answer this question in the affirmative," citing and discussing

California v. Pacif. R. R., 127 U. S. 1.
Pensacola Tel. Co. v. W. U. T. Co., 96 U. S. 1.
Telegraph Co. v. Texas, 105 U. S. 460.
McCulloch v. Maryland, 4 Wheat. 314.

Neither the *Charleston* case nor any other case that we can find, has held, or even intimated, that Congress did not have the power to grant intra-state as well as inter-state rights. If Congress has the power, and we submit the foregoing shows it has, did it grant to telegraph companies, accepting the Act of 1866, the right to do an intra-state as well as an inter-state business?

CONSTRUCTION OF THE ACT OF 1866.

BY THE ACT OF 1866, CONGRESS INTENDED TO AND DID GRANT TO TELEGRAPH COMPANIES ACCEPTING THE TERMS OF THE ACT, THE PRIVILEGE TO DO NOT ONLY AN INTER-STATE BUT ALSO AN INTRA-STATE BUSINESS.

The language of the Act is that telegraph companies "shall have the right to construct, maintain and operate lines of telegraph * * * on and along *any* of the military and post roads of the United States." The roads along which the company's lines are constructed within the State of Alabama and the City of Talladega are post roads. There is absolutely nothing in the statute from which it can even be inferred that the privilege granted thereunder is limited to the post roads that pass between the states. The purpose of the Act as expressed in its title, is to se-

cure the use of thelegraph lines, "for *postal, military and other purposes.*" For the privilege of doing business along post roads, the very privilege upon which the city seeks to impose a license, the company by filing the proper acceptance agreed to do the Government's business at a reduced rate, to give that business preference over its lines, and conferred upon Congress the right to appropriate the entire property of the company, if Congress so desired (Fed. Ann. Sts. Vol. 7, p. 212). It is absurd to contend that the Government desired a reduced rate on and preference for its business only between the states. It is just as important to the Government that its postal, military and other business between points within a state be dispatched with the same promptness as its business between the states. The rates for Government messages, fixed by the Government itself, are not limited to inter-state messages, but apply to *all* messages, whether inter-state or intra-state.

If Congress did not intend to grant to telegraph companies the right to do an intra-state business, in return for reduced rates on intra-state Government messages, what right or privilege did Congress intend to grant? Did Congress expect the telegraph companies to work for a reduced compensation without receiving anything in return, and give to the Federal Government the privilege to buy the entire plant at such times as the Government might desire, without some consideration for the option?

In *Western Union Tel. Co. v. Texas*, 105 U. S. 460 (26 L. ed. 1067), the Court said:

> "Congress to facilitate the erection of telegraph lines, has, by statute, authorized the use of the public domain and the military and post roads and the crossing of the navigable streams and waters of the United States for that purpose. *As a return for this privilege*, those who avail themselves of it are bound

to give the United States precedence in the use of their lines for public business at rates to be fixed by the Postmaster General."

If Congress, by the Act of 1866, did not intend to grant an intra-state franchise, then the passage of the Act was absolutely useless, for inter-state business would be fully protected by the inter-state commerce clause of the Constitution.

By the limited construction that the City of Talladega now seeks to put upon the Act of 1866, a telegraph company which has its lines only within a state can avail itself nothing under the rights "offered to "any telegraph company" by that Act.

The language of the Act is "That ANY TELEGRAPH COMPANY accepting the said Act" * * * shall have all the rights conferred thereby.

In *Pensacola v. Western Union Telegraph Company*, 96 U. S. 1, the Court, construing the Act of 1866, held that for the convenient transmission of intelligence *from place to place* by the Government of the United States, and *between its citizens*, AS WELL AS IN THE INTEREST OF COMMERCE, "the creation of telegraph lines shall, so far as State interference is concerned, be FREE TO ALL who will submit to the conditions imposed by Congress."

TAXATION.

SINCE CONGRESS BY THE ACT OF 1866, CONFERRED UPON THE WESTERN UNION TELEGRAPH COMPANY THE RIGHT TO DO AN INTRA-STATE TELEGRAPH BUSINESS ALONG THE POST ROADS, THE CITY OF TALLADEGA CANNOT IMPOSE A LICENSE TAX THEREON.

McCulloch v. Maryland, 4 Wheat. 316.
Osborn v. Bank of U. S., 9 Wheat. 740.

Western Union Tel. Co. v. City of Visalia, 149 Cal. 744.

Western Union Tel. Co. v. Lakin, as Treas., etc., 101 Pacif. (Wash.) 1094.

Western U. Tel. Co. v. Wright, (C. C. A.) 185 Fed. 250.

Harmon v. City of Chicago, 147 U. S. 396.

Moran v. City of Chicago, 112 U. S. 69.

California v. Central Pacific Ry. Co., 127 U. S. 1, 45.

Western Union Tel. Co. v. Texas, 105 U. S. 460.

We do not contend that a State or a municipality cannot tax the *property* of a telegraph company that has accepted the Act of 1866, but we do insist that a license cannot be imposed upon such a company by a State of municipality for the privilege of "constructing, maintaining and operating" its lines. So far as concerns a tax on property, we have no complaint. That question is not raised in the present case. We are complaining of a license on the "mere privilege of doing business" in the City of Talladega, which privilege, as distinguished from the rights given the corporation in the State of New York, where the company was organized, was granted to it by the Act of Congress.

In *Union Pacific Railroad Company v. Penniston*, (18 Wall.) 21 L. ed. 787, where the question of taxing the property of a corporation, which had powers conferred upon it by the United States Government, was raised, it appeared, as stated by Mr. Justice Story "that the Union Pacific Railroad Company was created to subserve, in part, at least, the lawful purposes of a national government; that it was authorized to construct and maintain a railroad and telegraph line along the prescribed route, and that grants were made to it and privileges conferred upon it, upon condition that it should at all times trans-

mit dispatches over its telegraph line and transport mails, troops and munitions of war, supplies and public stores upon the railroad for the Government, whenever required to do so by any department thereof, and that the government should at all times have the preference in the use of the same for all the purposes aforesaid."

The Court, distinguishing a tax upon the property of the railroad from a tax upon its rights granted by the Government, used this language (p. 793):

> "It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being, nor is it laid upon any act which the Company has been authorized to do; it is not a transmission of dispatches, nor the transportation of United States mail, or troops or munitions of war that is taxed, but it is exclusively the real and personal property of the agent taxed in common with all other property in the State of a similar character."

And in the same case, Mr. Justice Story, referring to the opinion of Chief Justice Marshall, in *Osborn v. Bank*, said (p. 793):

> "This distinction, so clearly drawn in the early decisions between a tax on the property of a governmental agency and a tax upon the action of such agent, or upon the right to be, has ever since been recognized."

The privilege granted the telegraph company by Congress is the very life of the corporation, "its right to be," in the foreign State of Alabama; it is this "right to be," in the State of Alabama and other States of the Union that the Act of 1866 gave and protects. To permit a State or a municipality to tax this privilege, places a weapon in the

hands of such State or municipality by means of which the life of the telegraph company can be destroyed in every State where it has its lines and business, except the State of New York, and the express purpose of the law enacted by Congress can be thereby thwarted. But the defendant in error argues that the Act of 1866 is permissive in its character, and therefore a State could not, by legislative enactment, prevent the Western Union Telegraph Company, though a foreign corporation, from doing business in the State. True, it can not be done directly, but by the power of taxation, the same can be accomplished indirectly. There is a well-established legal principle to the effect that "the law will not permit a thing to be done indirectly, which it prohibits being done directly."

In *McCulloch v. Maryland*, 4 Wheat. 316, this Court holding that the franchise of a United States bank is not subject to a license tax, said:

> "*A right to tax without limit or control is essentially a power to destroy.*" * * *
>
> "If congress has power to do a particular act, no State can impede, retard or burden it. * * *
>
> "Deny this exemption (from privilege taxation) to the bank *as an instrument of government*, and what is the consequence? There is no express provision in the Constitution which exempts any of the national institutions or property from taxation. It is only by implication that the army and navy and treasury and judicature of the Union are exempt from State taxation. Yet they are practically exempt and they must be, or it would be in the power of any state to destroy their use. Whatever the United States have a right to do, the individual states have no right to undo. The power of Congress to establish a bank like its other sovereign powers is supreme, or it would be nothing. *Rising out of an*

exertion of paramount authority, it can not be subject to any other power. Such a power in the state as that contended for on the other side, is manifestly repugnant to the power of Congress; such a power to establish implies a power to continue and preserve. There is a manifest repugnancy between the power of Maryland to tax, and the power of Congress to preserve this institution. A power to build up what another may pull down at pleasure is a power which may provoke a smile, but can do nothing else. This law of Maryland acts directly on the operation of the bank, and may destroy it. There is no limit or check in this respect, but in the discretion of the state legislature. That discretion can not be controlled by the national councils. *Whenever the local councils of Maryland will it the bank must be expelled from that state.*"

In *Harmon v. City of Chicago*, 147 U. S. 390 (37 L. ed. 216), quoting from *Moran v. New Orleans, supra*, the Court said:

> "The sole occupation sought to be subjected to the tax is that of using and employing the license of the United States to employ these particular vessels in the coasting trade; and the state thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which he derives from, the Constitution and laws of the United States. The Louisiana statute declares expressly that if he refuses or neglects to pay the license tax imposed upon him for using his boats in this way, he shall not be permitted to act under and avail himself of the license granted by the United States, but may be enjoined from so doing by judicial process. The conflict between the two authorities is direct and express. What one declares

> may be done without the tax, the other declares shall not be done except upon payment of the tax. In such opposition, the only question is, which is the superior authority, and reduced to that, it furnishes its own answer."

In *California v. Central Pacific R. R. Co.*, 127 U. S. 1 (32 L. ed. 150, 158), where the railroad pleaded acceptance of an act of Congress entitled "An Act to aid in the construction of a railroad from etc., and to secure to the Government the use of the same for postal, military and other purposes," the Court said:

> "How can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in McCulloch v. Maryland (4 Wheat. 316), 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subject to taxation by the State. The power conferred emanates from, and is a portion of the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty."

There is nothing in the argument that because the telegraph company transmits messages between private parties, it is not purely a governmental agency, and the business is for that reason taxable.

If Congress has a right to give life, it is but reasonable that it should have the right to provide for sustenance. To deprive the telegraph company of its intra-state business, and there may be a total deprivation of that business by privilege taxation, will be to take from it a portion of the sustenance which Congress intended to provide for it.

In *McCulloch v. Maryland*, (supra), Chief Justice Marshall said:

> "It imposes a stamp duty on the notes of the bank, and thus stops the very source of its circulation and life.
>
> "* * * a power to establish implies a power to continue and preserve."

In *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 740, also, where a federal bank franchise was in question and a revision of the *McCulloch* case (supra), was asked, Chief Justice Marshall, approving and reiterating the principles of that case, said:

> "It (the bank) is undoubtedly capable of transacting private as well as public business while it is the great instrument by which the fiscal operations of the government are affected, it is also trading with individuals for its own advantage. The appellant endeavored to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, etc. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business. * * *
>
> "It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government. Can this instrument, on any rational cal-

culation, effect its object, unless it be endowed with that faculty of lending and dealing in money which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, the vital part of the corporation, it is its soul; and the right to preserve it originates in the same principle with the right to preserve the skeleton or body which it animates. *The distinction between destroying what is denominated the corporate franchise and destroying its vivifying principle is precisely as incapable of being maintained as a distinction between the right to sentence a human being to death and a right to sentence him to total privation of sustenance during life.* Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute.

"This distinction, then, has no real existence. To tax its faculties, its trade and occupation, is to tax the bank itself. To destroy or preserve the one, is to destroy or preserve the other." * * *

"If the trade of a bank be essential to its character as a machine for the fiscal operation of the government, that trade must be as exempt from state control as the actual conveyance of the public money. Indeed a tax bears upon the whole machine, as well as upon the facility for collecting and transmitting the money of the nation, as that of discounting the notes of individuals. No distinction is taken between them."

To deprive the telegraph company of its profits on intra-state business by license taxation, takes away a material portion of its sustenance, and lessens the efficiency of the company as a governmental agency in the transmission of government messages.

In the *Osborne* case (*supra*), Mr. Chief Justice Marshall gave much importance to this principle. Among other things, he said (p. 864):

> "That the exercise of these faculties (private trade) greatly facilitiates the fiscal operations of the government, is too obvious for controversy and who will venture to affirm that the suppression of them would not materially affect these operations, and essentially impair, if not totally destroy, the utility of the machine to the government? The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government than it could otherwise be; and, if this be true, the capacity to carry on this trade is a faculty indispensible to the character and objects of the institution."

In the recent case of *Western U. Tel. Co. v. Lakin, as Treas., of Pierce County*, 101 Pacif. (Wash.), 1094 (May 28, 1909), the court holding that the franchise of this company was derived from the Federal Congress by the Act of 1866, and therefore not taxable, said:

> "The franchise to do business on and over the highways and post roads of the United States is not only a permission, but an advantage to the government, growing out of the necessities of adminstration. In it the government has an interest—upon it it must place dependance in time of war and in time of peace. It is a creature, not alone of the bounty of the gov-

ernment; it is born of its needs, and is essential to its maintenance." * * *

"It requires no argument to sustain the point that a mere tax on the privilege of doing business, *which in one way or another might interrupt this governmental interest*, cannot be sustained * * * a franchise tax arbitrarily levied cannot be sustained, *because it may result in the interruption of the functions or conveniences of government*." * * *

Chief Justice Marshall in the *McCulloch* case, *supra*, said, (p. 429):

"The sovereignty of the state extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States; we think it demonstrable that it does not." * * *

"If the United States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the powers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states."

In *Western Union Tel. Co. v. Texas*, 105 U. S. 460 (26 L. ed. 1067), the Court, after referring to the Act of 1866 and the tax sought to be imposed by the State of Texas, said:

> "It is a tax by the State on the means employed by the Government of the United States to execute its constitutional powers, and is, therefore, void."

An examination of the cases cited and relied upon by the Supreme Court of Alabama, we submit, will show that in no one of them was the question of imposing a privilege tax on the rights received by the Telegraph Company, under the Act of 1866, in question. Each of those cases involved the question of taxing the Telegraph Company's *property* situated and used in a particular State. When the opinion of Mr. Justice Sayre is read, one cannot help being impressed with the idea that, had he considered the question an absolutely open one, under the United States Supreme Court decisions, he would not have decided the case as he did. Speaking of the question of licensing the privilege received from the government, he says (Rec. p. 31) that "while perhaps it has never been answered in the form in which it is now cast, we cannot assume that it has been misunderstood." And he bases that statement on the *dicta* in some of the cases cited by him, and the fact that it appeared in some of those cases that the Western Union Telegraph Company had accepted the Act of 1866; but, as we have stated above, we confidently assert that an examination of the cases cited in the opinion of Mr. Justice Sayre will show that the question of taxing the privilege received from the Government was not decided, or attempted to be decided, in any of them. We will not impose upon the Court's time by a lengthy discussion of the cases cited in the opinion of the Supreme Court of Alabama, but respectfuly refer the Court to, with a request for a careful consideration of,—the opinion in the recent case of *Western Union Telegraph Company v. Wright*, (C. C. A.) 185 Fed. 250, decided in 1910, after the Alabama Court's opinion had been put out.

In the *Wright* case, the question was squarely presented to the United States Court of Appeals as to whether or not the franchise of the Western Union Telegraph Company derived from the Government under the Act of 1866 could be taxed by the State of Georgia. It was held not to be taxable, and Judge Pardee, in a well considered opinion, reviews all of the cases, and discusses at length *the particular cases on which the opinion of the Alabama Court is based*, and distinguishes each of those cases. The same cases are also discussed and distinguished in *Western Union Telegraph Co. v. Lakin*, 101 Pac. 1094.

II.

THE ORDINANCE IS IN CONTRAVENTION OF THE LAWS OF THE UNITED STATES, IN THAT IT FAILS TO EXCLUDE MESSAGES SENT ON GOVERNMENT BUSINESS WITHIN THE STATE.

For the transmission of Government messages, whether intra-state or inter-state, the company is compelled to charge a reduced rate, which is fixed by the Government, pursuant to the terms of the Act of 1866. The Company is just as much an agent or instrumentality of the Government in the transmission of intra-state as in the transmission of inter-state messages. And even should the Court hold that the city may tax private messages between parties within the State, the ordinance is invalid in failing to exempt Government messages within the State.

City Council of Charleston v. Postal Tel. Cable Co., Am. Elec. Cases, Vol. 3, p. 56.
Western Union Tel. Co. v. Texas, 105 U. S. 460.
Le Loup v. Port of Mobile, 127 U. S. 650.

In *City Council of Charleston v. Postal Tel. Cable Co.*, (supra), the ordinance, similar to that in the case at bar, was as follows:

> "To license to carry on any trade, business or profession hereinafter mentioned the following sums shall be paid: * * * telegraph companies or agencies, each for business done within the State, and not including that done without the State, $500.00."

The Superior Court of South Carolina holding the ordinance to be in violation of the laws of Congress, in that it failed to exclude Government messages, said:

> "And herein, we are necessarily brought to discuss the third conclusion: That the defendant corporation, having accepted the restrictions and obligations of the Act of Congress of the United States * * * 1866 * * * *occupies the position of an agent of the government of the United States for the transmission of messages on public business, and as such cannot have such a license imposed on it*, as is sought to be enforced by the ordinance under consideration, and that, therefore, the ordinance as well as the Act of the General Assembly of South Carolina, under which it is claimed to have been passed, is in contravention of the provisions of Section 3263 of the Revised Statutes of the United States, and in violation of as much of the provisions of Sec. 8, Art. I, of the United States Constitution as confers powers on Congress to place postoffices and post roads. * * *
>
> "The ordinance, as we have it, does not exempt government business sent by agents of the United States from one place to another, even exclusively within its own jurisdiction, and by undertaking to levy a license for business done within the State, *it necessarily included such government business*, and is, therefore,

> clearly in violation of the Act of Congress, and must be so construed."

In *Western Union Tel. Co. v. Texas*, 105 U. S. 460 (26 L. ed. 1067, 1068), where the statute of the State of Texas failed to specially exempt government messages, the Court said:

> "As to the government messages, it is a tax by the State on the means employed by the Government of the United States to execute its constitutional powers, and therefore void."

The ordinance, therefore, in failing to exclude a portion of intra-state business upon which the City cannot levy a license tax, is void *in toto*, as a tax on a part affects the whole.

Le Loup v. Port of Mobile, 127 U. S. 640.

It will be noted that the ordinance in *Postal Tel. Co. v. Charleston*, 153 U. S., 691, discussed under "Point I," p. 9, *supra*, expressly excluded inter-state and government messages; and the point we make here as to Government messages not being excluded by the ordinance in the case at bar was not before the Court in the case of *Eufaula v. Moore*, 97 Ala. 670. It is therefore clear that the Court may properly and should reverse the case at bar without quarreling with either of these decisions.

III.

THE ORDINANCE IS INVALID FOR THE REASON THAT THE LICENSE IMPOSED IS FOR REVENUE AND NOT FOR POLICE REGULATION OR INSPECTION.

Postal Tel. Co. v. Taylor, 192 U. S. 64.

Sunset Telephone Co. v. City of Bedford, 115 Fed. 202.

Ottumwa v. Zekind, 95 Ia. 622 (58 Am. St. R. 447, 451).

Chaddock v. Day, 75 Mich. 527 (13 Am. St. R. 468, 472).

Austin v. Murray, 16 Pick. (Mass.) 126.

It will probably be contended by the appellee that the question involved under this "Point" was set at rest in Alabama by *Moore v. Eufaula, supra*, but we submit such a contention is not sound. That case does not decide that the Act of 1866 does not grant to telegraph companies the right to do an intra-state business. It merely holds that intra-state business of telegraph companies is subject to police regulations and that a State *may tax the property, not the government granted franchise* of the company. The license in that case was evidently upheld as a police regulation. The key note of the decision is expressed by the Court in these words (p. 671):

> "*Considered purely as a foreign corporate body*, deriving its powers from a charter granted by the State of New York, *the State of Alabama has the power to prescribe police regulations for its government within its boundaries, and to tax its property situated here for the purposes of revenue*, having due regard that no unjust discrimination be made."

That a State has the right and power to tax the property of a foreign corporation within the State is sound law, and it may be good law that a reasonable sum imposed for police regulation, as in the Eufaula case should be upheld. In that case the license does not seem to have been unreasonable, and may be properly upheld as being for police regulation or inspection.

It is true that Section 2 of the ordinance in the present case (Rec. p. 16) provides that the licenses required by the ordinance are "to be in the exercise of the police power

of the City of Talladega, as well as for the purpose of raising revenue for said City." However, the evidence shows clearly that the license imposed on telegraph companies in that ordinance is solely for revenue and not for police regulation or inspection. Both the Clerk and Treasurer of the City of Talladega testified that no sums had been paid for inspecting or policing the property or lines of the Western Union Telegraph Company (Rec. p. 23).

It appears from the face of the ordiance that it was for a double purpose, revenue and police regulation, but the evidence shows that, so far as applicable to the telegraph company, it was solely for purposes of revenue.

In *Ottuma v. Zekind*, 95 Iowa, 622 (58 Am. R. 447, 450), the Court said:

> "It seems to us, in view of the nature of the business licensed, the fact that it was in no manner injurious to the public health or morals, that it was confined to a particular place, and was not of such a nature as to become a nuisance, that it did not require the police supervision, and was in no manner calculated to disturb the peace and quietness of the city, that it is perfectly apparent that the fee exacted in this case was not required as a police regulation, but for the purpose of revenue for the city."

Even though the ordinance, in the present case, had not declared its double purpose, and had declared its sole purpose to be a police regulation, the Court will look into the operation of the ordinance to determine the purpose for which the license is levied.

In *Morgan's S. S. Co. v. Louisiana*, 118 U. S. 426 (3 L. ed. 241), the rule is declared by the Supreme Court as follows:

> "In all cases of this kind, it has been repeatedly held that when a question is raised whether a statute

is a just exercise of State power or its intended by round-about means to evade the domain of Federal authority, the Court will look into the operation and effect of the statute to discern its purposes."

And in *Postal Tel. Co. v. Taylor*, 192 U. S. 64, (48 L. ed. 342, 346), the Court says:

> "Judging the intention of the borough by its action, it did not intend to spend anything for an inspection of the poles and wires, and did intend to raise revenue under the ordinance. *Courts are not to be deceived by the mere phraseology* in which the ordinance is couched, when the action of the borough, in the light of the facts set forth in the affidavit, shows conclusively that it was not passed to repay the expenses or provide for the liabilities incurred in the way of inspection or for proper supervision."

And where a privilege tax is declared to be for police regulation, but upon investigation is shown to be for revenue, it is invalid when attempted to be imposed upon a telegraph company which has accepted the Act of 1866.

Postal Tel. Co. v. Taylor, 192 U. S. 64, *supra*.

IV.

THE CITY OF TALLADEGA HAS NO RIGHT TO ARREST AN OPERATOR OF THE WESTERN UNION TELEGRAPH COMPANY FOR VIOLATING A LICENSE ORDINANCE.

Apart from the legality or illegality of the ordinance imposing a license, we most urgently insist that the City has no right to arrest an operator performing service for a Telegraph Company which has not paid a license tax imposed *for revenue only*. It is shown in this record that

the appellant was an agent of the United States Government in that at the time mentioned in the warrant of arrest he was actively engaged in sending and receiving Government messages. It is of the greatest importance that the telegraph lines of the United States Government should be open and clear at all times. Congress in the exercise of its powers, as is shown by the decisions, has properly seen fit to take into its postal service the telegraph company, making that company, and its servants the agents of the Government in the transmission of messages. Failing to pay a license tax on an occupation, imposed for revenue, is not an act which is *malum in se*. It is not an act which is against the morals or a breach of the peace. The City of Talladega has its civil remedy for collecting the license, if valid, from the telegraph company, which is well able to respond in such sums as may be adjudged against it.

The telegraph company in the transmission of Government messages is in the service of the Government as is a rural mail carrier. Certainly no one would seriously contend that the courts would for a moment consider upholding an ordinance imposing a tax on the occupation of delivering mail on the rural routes of the United States. There is no distinction in principle.

The principle for which we contend under this "Point" is established in the United States Courts. In *Ex parte Conway*, 48 Fed. 77, where the foreman of a telegraph gang was arrested for obstructing a public road in violation of a local act, the Federal Court discharging him on a writ of habeas corpus, said:

> "The petitioner is a foreman of the gang engaged in constructing and erecting the lines of the Postal Telegraph and Cable Company. This Company, incorporated under the laws of New York, has its line running through all the Atlantic States, and the line upon which the petitioner was engaged connects Charleston with Savannah. The Postal Company has

accepted the provisions of the Act of Congress approved July 24, 1866. This Act entitled 'To aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes,' authorizes the construction of telegraph lines over and along any of the military and post roads of the United States. By act of March 1, 1884, all public highways and roads were declared post roads of the United States. The petitioner alleges that while he was engaged as such foreman in constructing this line through Colleton County in South Carolina, over and along the Old State Road between Charleston and Savannah—a public road kept up and worked,—he was arrested and is now in custody under a warrant issued by a trial justice of said county upon the charge of obstructing a public road. He alleges that he is acting under and by virtue of the provisions of the Act of Congress and claims the protection of this court. * * * Let the prisoner be discharged."

In *Re Matthews*, 122 Fed. 248, 259, the Court said (p. 260):

"The federal courts will not permit a federal officer or agent to be restrained of his liberty by state authority for an act done in pursuance to federal law. The exceptional case referred to is that of Ex parte Conway, where the person imprisoned was not a federal officer or agent, but the foreman of a gang engaged in constructing a telegraph line along a public highway pursuant to federal authority. This was a case of urgency, because the construction of that line was a matter in which the National Government and public at large were highly interested, and the imprisonment of the person engaged in constructing it put a stop to its construction until the matter could be dis-

posed of in the course of the proceedings by virtue of which the imprisonment was had."

V.

THE ORDINANCE IS UNREASONABLE AND THEREFORE VOID.

It is well settled that when an ordinance imposes a license that is unreasonable in amount, the ordinance is for that reason void.

Ex parte Byrd, 84 Ala. 17, 20.
Hendrick v. State, 142 Ala. 43, 46.
Town of Marion v. Chandler, 6 Ala. 899, 901.
Ex parte Frank, 52 Cal. 606 (26 Am. R. 642, 645).
Postal Tel. Co. v. New Hope, 192 U. S. 55.
Ottuma v. Zekind, 95 Iowa 622 (58 Am. R. 447, 450).
Simrall v. City of Covington, 90 Ky. 444 (29 Am. St. Rep. 398, 400).
Brooks v. Mangan, 86 Mich. 576 (24 Am. St. Rep. 137, 138).
Chaddock v. Day, 85 Mich. 527 (13 Am. St. Rep. 468, 472).
City of St. Paul v. Laidler, 2 Minn. 190 (72 Am. Dec. 89, 94).

The ordinance imposes a license for only the privilege of sending messages to and from the City of Talladega to points within the State. It properly does not seek to tax "interstate business" (Record, p. 17; LeLoup v. Port of Mobile, 163 U. S. 640). We are, therefore, concerned only with the receipts on messages sent from Talladega to other points within the State of Alabama, and sent from other points within the State and received at Talladega. The total income from that source for eleven months, dur-

ing the year 1908, was $465.70. The tax imposed by the ordinance is $100.00, but since the defendant was not permitted to show the intra-state receipts for the month of January it is only fair that in this argument we should deduct from the $100.00 license a pro rata amount for the month of January, which would be $8.33 1-3, making the license for the 11 months to be $91.66 2-3, which is more than 19 per cent of the gross receipts. Will any one seriously argue that more than 19 per cent of one's entire income is a fair license for the privilege of doing business? After $91.66 2-3 is paid for the privilege of doing business, only $374.03 is left for operating expenses; and for a moment let us direct our attention to the expenses of this office.

The total expenses of the Talladega office for caring for both intrastate and interstate business was $1,928.57, but since defendant was not permitted to show the income on intra-state messages for the month of January, it is fair that we should deduct from the year's expense, the expense of the month of January, 1908. The sum expended by the manager at the Talladega office for that month was $90.43 (Rec. p. 20). The other sums expended, as testified to by Auditor Bacon, for the year amounted to $823.36, which prorated would be $68.58 per month. Add the last named sum to $90.43, the result is the total expense for the month of January, $159.01, which when deducted from $1,938.57, the expense for 12 months, leaves $1,769.56 as the expense for 11 months. Then deduct from the last amount the two items of $10.00 each, objected to by the complainant (DuBose, Rec. p. 20), there is the balance of $1,749.56 the expense for 11 months to be used for the purposes of this argument.

It is true that the entire expense of the office should not be charged against "intra-state" messages, but it is equitable and fair that the business sought to be covered by the ordinance should stand for a proportionate part

of the total expense. It is a simple problem in arithmetic to determine that part: The total year's income of the office, including "interstate" business, which is not taxable (LeLoup v. Mobile, *supra*), is $2,190. Deducting one-sixth of $937.01, the total for the first six months of the year (Rec. p. 20), for January, which is $156.11, we have $2,034.39, the total income on "interstate" and "intrastate" business for eleven months. The gross income derived from "intrastate" business for that period is $465.70 which is a fraction more than 22 per cent of $2,034.39, the entire income on both kinds of business. Therefore, "intrastate" business should be charged with a like percentage of the entire expense. Twenty-two per cent of the entire expense, $1,749.56, is $384.90.

Add the "intrastate" expense, $384.90, to the amount of the license tax, $97. 66 2-3, and the sum will be the total expense for the "intrastate" business, $476.56. The gross receipts from that business is only $465.70. *Therefore, it is seen that the "intra-state business," the only business which the city can, according to the terms of the ordinance tax, is done at a loss of* $10.86.

The defendant was not arrested for failing to pay the entire year's license, $100.00, but for refusing to pay $25.00, the quarter's license alleged to be due October 1st. (Rec. p. 19). The figures for that quarter clearly show that $25.00 is unreasonable for that period, but desiring to settle for all time this controversy with the city of Talladega and the numerous other towns and cities in the State that have increased the license tax of the Western Union on acount of loss of revenue by reason of enactment of the prohibition laws, we desired it to be known that we had nothing to conceal, and attempted to show the record for the entire year.

The city's objection to the witness testifying to the January receipts has rendered it advisable to go into details, as above, which was hardly necessary, for the facts

concerning the quarter's license, which the appellant refused to pay and for which refusal he was arrested, are sufficient to clearly show the unreasonableness and confiscatory character of the license.

The tax sought to be collected for the quarter, October, November and December, is $25.00. The total income from "intra-state" business for that period was $128.16 (Williams, Rec. p. 21). It is therefore seen that the license for that period is more than 19 per cent of the gross receipts.

The total sum expended at the office for that period in caring for both "inter-state" and "intra-state" business was $289.83 (Rec. p. 21). The other sums expended for the office, as testified by witness Bacon, for the year amounted to $823, a quarter of which is $205.75, which added to $289.83 gives the entire expense for the three months, $495.58.

Then what part of this amount, the expense for both "inter-state" and "intra-state" business, is chargeable against "intra-state" business?

The total income of the office for the quarter, including "interstate" business, which is not taxable, is $600.67 (Rec. p. 22). The gross income derived from "intra-state" business for the quarter, $128.16, is 21 per cent of the entire receipts. Therefore the "intra-state" business should be charged with a like percentage of the entire expense. Twenty-one per cent of the gross expense for the quarter, $495.58 is $104.07. Add to the proportionate expense the amount of the license tax, $25, and the sum will be the total expense for "*intra-state*" business—$129.07. The gross receipts from that business is $128.16. *It is, therefore, seen that "intra-state" business for the quarter for which the license was demanded was done at a loss of ninety-one cents.*

It will be noted that the foregoing computations are made, and the loss on intra-state business is shown, with-

out taking into account the amount paid as taxes to the State of Alabama, or the expense of maintaining its general and division offices.

The record shows that the Company, for the privilege of doing business in the State, pays taxes on its lines and other property in this State at a valuation fixed by the State Board of Assessment (Code, Sec. 2085), which tax aggregates $4,250.00; and also upon its instruments and other personal property at Talladega (Rec. p. 19). When a pro-rata part of thes taxes, together with a pro-rata part of the salaries of the general officers and expenses of conducting the general offices, is considered, it clearly appears that the loss on intra-state business, as above shown, will be materially increased.

No charge of extravagance is made, and none can be inferred. The company employs at the Talladega office only one operator and one messenger boy; the office is small and simple (Rec. pp. 20-22).

The Western Union Telegraph Company is the only commercial telegraph company at Talladega. The population in 1900 was only 5,056 and on January 1st, 1909, 7,500, and the company's messenger service was ample. There is no direct charge of want of dilligence in procuring business, and negligence in that respect, we submit, cannot be inferred from the facts.

The facts in this case as to expenses are conclusive as to the unreasonableness of the license; but apart from expenses, we submit that a license which consumes $91.66 2-3 of a gross income of $465.70, as shown for eleven months, or a license consuming $25 of a gross income of $128.16, as shown for the quarter, is beyond controversy not only extremely unreasonable and excessive, but actually prohibitory.

It was urged by the appellee in the Supreme Court of Alabama that under the decisions of this State a court cannot declare a license void for unreasonableness unless

it is shown to be "prohibitory." There is some such language to be found among the Alabama decisions; and though the foregoing facts are clearly within such language, we wish to call attention to the rule which prevails in all jurisdictions. In the decisions referred to, just what "prohibitory" means is not shown, and the Court attempted no definition of "prohibitory" until the recent case of *Kendrick v. The State*, 142 Ala. 43, where the Court says:

> "The only question, then, which remains to be decided in this case is whether or not, in this case, the license tax imposed is so excessive and unreasonable as to amount to a prohibition of the business or (in the language of the Supreme Court of the United States, in *Lawton v. Steele*, 125 U. S. 137), *'under the guise of protecting the public interests, arbitrarily to interfere with private business, or impose unusual and unnecessary restrictions upon a lawful occupation.'*"

The definition as thus given in the *Kendrick* case prevails everywhere, and is found in other Alabama decisions.

In *Ex parte Byrd*, 84 Ala. 17, where the validity of an occupation license was before the Court, it was held (p. 20):

> "Such ordinances, however, must not be inconsistent with general laws; *they must be reasonable in their provisions.*" * * *

In *City of Mobile v. Yuille*, 3 Ala. 136, the Court said (p. 144):

> "We have seen that the mere creation of a corporation (municipal) carries with it the power to make all laws *which are reasonable*, and not contrary to

> the general laws of the State. * * * * The penalty for a violation of a by-law must, like the by-law itself be reasonable."

In *Postal Telegraph Co. v. New Hope*, 192 U. S. 55, the Court, declaring a license tax on a telegraph company void, said:

> "The verdict necessarily found the license fee exacted by the ordinance unreasonable, and the ordinance itself was therefore void."

In *Johnson v. Philadelphia*, 47 So. R. (Miss.) 526, the Court said:

> "There is implied in every delegation of power to a municipal corporation a condition that the power must be exercised reasonably, and therefore every unreasonable ordinance is ultra vires, and the court in treating it as null and void merely enforces the legislative wil and principles of policies embodied in it.
>
> "The power to regulate is given for a wholesome purpose. It is a defensive power of municipalities, and not a weapon of destruction."

In *Simrall v. City of Covington*, 90 Ky. 444 (29 Am. St. R. 998, 400), the Court said:

> "Cooley on Constitutional Limitations, pages 200 and 202, says: 'Municipal by-laws must also be reasonable. Whenever they appear not to be so, the Court must, as a matter of law, declare them void.'"

VI.

THE TESTIMONY OF WITNESS BACON, WHICH APPEARS TO BE HEARSAY, MUST BE CONSIDERED ON APPEAL.

It may be argued that since Bacon's testimony as to expenses appears to be hearsay, it should not be considered on this appeal in determining whether the trial Court erred in its decision, but it is well settled that parties in an action may try their cases on illegal evidence if they so desire, and that when illegal evidence is not objected to in the court below it must be considered on appeal by the appellate court in determining whether or not the court below erred in its decision. Bacon's testimony was not objected to at the trial (Rec. p. 23-24).

Masterson v. Fuller, 62 Ala. 146, 149.
Rice v. Tobias, 89 Ala. 214, 217.
Higdon v. Kennemer 112 Ala. 351, 355.
Tollen v. State, 94 Ala. 111.
McLendon v. Bush, 127 Ala. 470.
McCallam v. State, 96 Ala. 98, 99.
Billingsley v. State, 98 Ala. 126, 127.

In *Higdon v. Kennemer* 112 Ala. 351, where the case was tried in the Court below without a jury, the Court said (p. 355):

> "The oral testimony was perhaps subject to objection and exclusion thereon. No objection to it was made and it was not excluded. 'Parties may try their causes on illegal evidence if they choose to do so.' These parties so elected here. The evidence is to be considered."

In *Rice v. Tobias*, 89 Ala. 214, the Court said (p. 217):

"The sixth assignment of error based on the supposed incompetency of certain evidence can not be sustained. It is immaterial whether the evidence was competent or not. No objection was made to it in the court below and no ruling invoked or had on it. Such objections will not avail, when taken for the first time in this court, either for the purpose of putting the lower court in error in admitting the testimony, or for the purpose of having this court exclude it in passing upon the sufficiency of the proof to support the decree."

VII.

THE TRIAL COURT ERRED IN NOT PERMITTING WITNESS DUBOSE TO TESTIFY AS TO THE AMOUNT OF RECEIPTS DERIVED FROM INTRASTATE BUSINESS FOR THE MONTH OF JANUARY, 1908.

Stuart v. Mitchum, 135 Ala. 546, 551.
Crook v. Webb, 125 Ala. 457, 465.

The witness was asked to state the amount of intrastate receipts for January 1908. The question was objected to on the ground that it was not shown that she knew of her own knowledge and that the original record was not introduced. It will be noted that the witness as a predicate for the question, testified that she had looked for the original record; that she had been unable to find it; that she had looked in the place where it was usually kept; that the last time she saw it, it was in a pigeon hole in the desk where she kept such records, and that she had looked in that pigeon hole for it (Rec. pp. 19-20).

In *Stuart v. Mitchum*, 135 Ala. 546, it was sought to introduce secondary evidence of a mortgage. The court, holding that such evidence should have been admitted, said (p. 550):

"The witness testified that a few days previous to the time of the trial he had these papers in his desk and took them out with a view of having them at the trial and laid them on his desk, and that he had not seen them since. That they were not on his desk where he put them, and that he had made search for them but could not find them and did not know where they were. This witness was claimant's attorney. The predicate made was sufficient for the introduction of secondary evidence as to the contents of the lost papers."

In the case at bar the predicate laid was equally as strong if not stronger, than in either of the foregoing cases; and it will be noted that the defendant offered as a further predicate, to show the custom of the company to destroy all records after eight months (Auditor, Rec. p. 20).

VIII.

THE TRIAL COURT ERRED IN ITS REFUSAL TO PERMIT THE AUDITOR OF THE WESTERN UNION TELEGRAPH COMPANY TO TESTIFY THAT IT WAS A CUSTOM OF THE COMPANY TO DESTROY ALL RECORDS AFTER EIGHT MONTHS.

The purpose of this testimony was to support the predicate for the question discussed in Point VI, supra. The Auditor's testimony showed that he knew the rule; and that he himself had instructed offices concerning the same (Rec. p. 20). It was, therefore, clearly relevant and should have been admitted.

CONCLUSION.

We admit that there is some conflict and confusion in the *dicta* among the decisions of the Supreme Court of the

United States in its interpretation of the Act of 1866, and that some things have been said by that high tribunal that are seemingly authority against our contention; but we believe that we have demonstrated that the interstate commerce clause of the Federal Constitution has no bearing on this subject.

A telegraph company does not trade in anything, nor does it transport goods or merchandise from one place to another. By its apparatus it merely transmits information from one point to the other, whether the same pertains to business or mere social intercourse. It has often been decided that it is not a carrier.

Our contention is that the Act of 1866 comes within a much broader provision of the Federal Constitution; namely, the power granted to Congress to provide all of the citizens of the United States with untrammelled means of communication, comprehended under the simple clause amongst the enumerated powers of Congress, "To establish post offices and post roads." At the time of the adoption of the Constitution, the telegraph had not been invented. For that matter, there were no railroads to carry the mails. Congress seized upon this new invention as an important adjunct to its Post Office Department. Just as it, in its earlier history, began to make contracts with railroad companies for a more rapid transit of its mails, it seized upon the telegraph as a still more rapid substitute. As was said by Judge Stone in the *Henderson* case, 89 Ala., on page 516: "Telegraphy is a quick moving substitute for mail service, which, by contrast, has become tardy."

It is just as much within the power of Congress to provide the instrumentality of a rapid and almost instantaneous transmission of a message from, say, Talladega, in Alabama, to Montgomery, in Alabama, as between New Orleans, Louisiana, and the City of New York. So far as human agency is concerned, the operator at Talladega did no more and no less in sending messages from that

office to, say, Atlanta in the State of Georgia than to Birmingham in the State of Alabama.

The decisions holding that the state or municipality cannot tax interstate business are based on the theory that the Federal Constitution has taken the subject entirely away from the States and given it over entirely to Congress. The Courts would have made the same ruling they did make in all these cases had the Act of 1866 never been passed. *Unless, therefore, the Act means what we contend, it has no field of operation. The interstate business of a telegraph company would have been as well protected without it.*

While we can hardly contend that the opinion of this Court in the recent case of *Western Union Telegraph Company* vs. *State of Kansas*, 216 U. S. 1, is decisive of the questions presented in this case, we do contend that our argument is entirely consistent and in harmony with the decision of that case.

Mr. Justice Holmes in his dissenting opinion in the *Kansas* case, says:

> "If, after this decision, the State of Kansas, without giving any reason, sees fit simply to prohibit the Western Union Telegraph Company from doing any more local business until it has paid $20,100.00, I shall be curious to see upon what ground that legislation will be assailed."

If it should be thought necessary to answer the question implied, we think it sufficient to reply:

The Telegraph Company, confining its operations to the Post Roads of the United States, is exercising a *privilege*, lawfully conferred upon it by Congress, and, in doing so, has not only the protection from State interference that inures to it under the interstate commerce clause in common with all individuals and corporations engaged

in interstate commerce, but also the protection resulting from the declaration in Article VI of the Federal Constitution, that:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof * * * * * * shall be the supreme law of the land; and the judges in every State shall be bound thereby," &c.

We do not contend that the Act of 1866 relieved a telegraph company accepting its provisions from the payment of taxes on its property nor from compliance with all reasonable police regulations. The telegraph company must pay its way. If it went over a turnpike owned by private citizens, it would be compelled to pay for its right of way, just as the mail carrier would have to pay toll at each toll gate. It must pay taxes on its property, just as the mail carrier must pay taxes on his horse and cart. But for the privilege of exercising this calling neither the State nor any of its instrumentalities has the right to require anything; nor has the State any more right to arrest one of its agents or operators for failure to pay a privilege tax imposed for revenue than it would have a right to arrest a route agent in the postal service of the United States for failure to pay a like privilege tax.

Respectfully submitted,

Attorneys for Plaintiff-in-Error.

7

SUPREME COURT OF THE UNITED STATES

NO. 44.

D. G. WILLIAMS, *Plaintiff in Error.*

vs.

THE CITY OF TALLADEGA, *Defendant in Error.*

BRIEF OF J. K. DIXON, FOR THE DEFENDANT IN ERROR.

THE BROWN PRINTING COMPANY, Montgomery, Ala.

SUPREME COURT OF THE UNITED STATES

NO. 266.

D. G. WILLIAMS, *Plaintiff in Error,*

vs.

THE CITY OF TALLADEGA, *Defendant in Error.*

BRIEF OF J. K. DIXON, FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a suit in which the plaintiff in error seeks to review a decision of the Supreme Court of Alabama, holding that a certain license tax levied by the City of Talladega against the Western Union Telegraph Company was proper. The Plaintiff in error relies principally upon the fact that they had accepted and were doing business under the Act of Congress approved the 24th of July, 1866, and on account of this fact could not be required to pay any license tax, although fixed upon its interstate business. The Ordinance complained of fixing the license is set forth on pages 7 to 18 inclusive of the transcript of record. The particular provision which is applicable to a telegraph company is as follows:

> "158. Telegraph Company. Each person, firm or corporation *commercially* engaged in business sending messages to and from the City to and from points in

the State of Alabama for hire or reward, $100.00." (Pg. 15 of the transcript).

"Section 2. Be it further ordained by the City Council of Talladega, that the licenses required by this Ordinance, is and is declared to be in the exercise of the police power of the City of Talladega, as well as for the purpose of raising revenue for said City." (Pg. 16 of the transcript.)

It is also claimed that even if the City had authority to license an intra-state business it must exclude in the ordinance its taxes on business of the government. The only evidence in regard to any business being transacted for the government is found in the agreed state of facts (page 18 of the transcript), in which it is stated as follows that it (referring to the Western Union Telegraph Company) was "engaged in the business of transmitting messages between private parties and the Departments and agencies of the United States Government from Talladega to other points in the State of Alabama and also from other points in the State of Alabama to Talladega. It also referred to (page 22 of the transcript) in the testimony of witness Williams, in which it is stated as follows, to-wit: "On re-direct examination, the witness Williams testified that he daily relayed Government messages at the Talladega office. That he received messages between the different Departments of the Government of the United States at this office from points within the State. That preference was given to the Government messages. That Government messages were sent at reduced rates." There was no evidence that any sum was received at the Talladega office from the Government for transmitting its messages from one point in the State to another, and in computing the amount received from intra-state business they only computed the amount taken in at the Talladega office and did not include anything for messages sent collect.

The point is also made in the case that the charges were unreasonable and therefore void. As stated, there was no evidence showing the total amount of intra-state business. It was estimated that it is approximately the amount received at this office, as the amount of collect messages sent would about offset those received collect. One A. J. Bacon sought to state the expenses of the office (see page 23 of the transcript), but stated that what he said was simply an estimate and approximate sum. It was also shown that there was no other telegraph office in the town of Talladega, and that it was a city of about seventy-five hundred people, and that the Western Union Telegraph Company paid taxes to the State of Alabama in the sum of $4,237.45, but was assessed only $, from which we judge nothing was ever paid to the City Government in the way of taxes (see page 19 of the transcript), so that according to the facts shown for police protection and for the revenue of the City, either taxes or otherwise, that the Western Union Telegraph Company paid nothing to the City Government except this $100.00, which was sought to be charged in the nature of a license which under the ordinance stated the same was made under its police power and also for the purpose of raising revenue.

ARGUMENT.

I.

The first point insisted on by Counsel for plaintiff in error is that "the franchise of the Company to do business in the City of Talladega is derived solely from Federal Congress, and is therefore not taxable by the City for the purpose of revenue." It is true that the Supreme Court of the United States has held that where the privilege or license tax is for the use of the City and imposed upon the Company's business generally that it must be charged sole-

ly under police power and should be approximately what it cost the police protection and inspection.

City of St. Louis v. Western Union Tel. Co., 148 U. S. pg. 92. But a different rule applies where the same is limited to a license based solely on intra-state business. In such case, the charge can be made both as a police regulation and for the purpose of raising revenue. This Court has held in numerous cases that, notwithstanding the Western Union Telegraph Company has accepted the conditions of the Act of Congress of 24th of July, 1866, entitled an Act to aid in the construction of telegraph lines to secure to the Government of the United States the use of the same for postal, military and other purposes. (See: Federal Annotated Statutes, Vol. 7, pgs. 205-213). An ordinance is valid imposing a license fee on such Company for business done exclusively within the State.

Postal Telegraph Co. vs. City Council of Charleston, 153 U. S., 692.

Western Union Telegraph Co. vs. State of Texas, 105 U. S. 460.

Ratterman vs. Western Union Telegraph Co., 127 U. S., 411.

Western Union Telegraph Co. vs. Commonwealth of Pennsylvania, 128 U. S., 39.

Western Union Telegraph Co. vs. Atty. General of Commonwealth of Massachusetts, 125 U. S., 530.

Western Union Telegraph Co. vs. State of Missouri, 190 U. S., 412.

Western Union Tel. Co. vs. Seay, 132 U. S., 472.

This statute and the question of taxation is considered in 37th Vol. of Cyc. of Law & Procedure, pgs. 1622-1625 inclusive, and the language used is as follows:

"The federal statute of 1866, sometimes known as the Post Roads Act, authorizes all telegraph companies accepting its provisions to construct, maintain, and operate lines of telegraph over any portion of the public domain and over and along any of the military or post roads of the United States, provided they are so constructed as not to interfere with ordinary travel on such roads, and by later statutes the term "post roads" is made to embrace all railroads, and all public roads and highways while kept up and maintained as such, including the streets of a town or city. * * * As to telegraph companies which have accepted the provisions of the act it confers the right to construct lines of telegraph over and along the places named and insures such companies against exclusion by or any unreasonable interference on the part of any state or political subdivision thereof, although it does not confer the absolute right to construct and maintain such lines free from legislative or municipal regulation and control. The act is merely permissive, and the franchise, or privilege granted must, like any other franchise, be exercised in subordination to both public and private rights. The act does not authorize the taking without compensation of state or municipal property, which includes public streets and highways, or of private property, which includes railroad rights of way, or even authorize the taking of such property in the absence of condemnation proceedings without the owner's consent, although compensation therefor is tendered. The statute does not confer the right of eminent domain, or authorize any compulsory proceedings for the taking of property without the owner's consent, so that if the company is not entitled under the state statutes to exercise the right of eminent domain, it cannot take private property without the owner's consent, although willing to make just compensation

therefor. It does not deprive the state of the right to tax the property of the telegraph company, including its franchise, as far as the same has a *situs* within the state, nor of the right to exact rental for the use of state property or to permit a municipality to exact such rental for the use of its streets where the municipality owns the streets; nor of the right to impose or permit a municipality to impose a license-tax, as a revenue measure, provided such tax is based exclusively on domestic messages not pertaining to the business of the Government of the United States; nor of the right under the police power to exact or permit the exaction by a municipality of a license-fee, not as a revenue measure, but designed to cover and commensurate with the cost of police supervision."

See also:

Moore vs. City of Eufaula, 97 Ala., pg. 670.
Williams vs. City of Talladega, 164 Ala., 633.
Western Union Tel. Co. vs. City of Freemont, 26 L. R. A. (Old Series), page 698.

These decisions of the Supreme Court of the United States with numerous others being so uniform and decisive on this question, it seems to us useless to further argue this proposition. As is well said by Judge Sayre in his decision in the Supreme Court of Alabama (pg. 31 of the transcript) that "from the cases we have cited, and from others to be found cited in them, it is to be seen that the argument here made has been repeatedly urged by this appellant's company upon the Supreme Court of the United States without success." The statement is made in brief of Counsel for plaintiff (pg. 29 of the argument) that "one cannot help being impressed with the idea that, had he considered the question an absolutely open one, under the United States Supreme Court decisions, he (Judge Sayre)

would not have decided the case as he did." Where such an impression can be derived from this opinion of Judge Sayre's we cannot say. We believe he would have decided it just as he did, and the decision shows this if the question had been an open one, as both law and reason favor such decision.

II.

The second proposition which is urged in the brief of Counsel for plaintiff in error is that even if this Court followed the former decisions on this question, that notwithstanding this it will declare this ordinance invalid because of the fact that Governmental messages are not excluded from this ordinance. In reply to this argument Judge Sayre well said (see pg. 34 of the transcript):

> "This court in *Moore v. City of Eufaula*, 97 Ala., 670, proceeding upon reason and the authority of other decisions of the Supreme Court of the United States refused concession to the idea that a privilege tax was void because it did not affirmatively appear that it did not affect the sending of messages on government business. We are satisfied with that decision. In the instant case the tax is limited in the terms of the ordinance levying it to the business of sending messages between points exclusively within the State. The fact that a part of the business done by the company consists in the sending of messages for the government does not affect the right of the State to impose a reasonable privilege tax, as we believe has appeared from a consideration of the decisions of the Supreme Court of the United States. If government messages are transmitted at a reduced rate which has material effect upon the company's income at Talladega, that was the subject of proof and must have been, and must now

"The reasonableness or unreasonableness of a license tax cannot be determined by the extent of the business of a single individual. There may be competition or negligence on his part, or other considerations affecting the extent of the business of complainant."

It further says:

"While the business of 1908 shows that the telegraph company at Troy was run at a loss, in so far as intra-state business is concerned, yet it is not shown that such is a proper criterion as to the business of a telegraph company from year to year in that city. Moreover, in the estimate of expenses, a proportionate part of the office expenses is included, which would have to be paid at any rate, whether any intra-state business was done or not.

City of Troy vs. Western Union Tel. Co., 164 Ala. 482.

Judge Sayre in the present case, in answer to this argument says as follows: (See pgs. 34-36 of the transcript).

"Prima facie the tax was reasonable. * * * The trifling deficiency shown in this case, occurring as the result of business for one short period, do not suffice to show an abuse of the taxing power—See *Atlantic &c. Telegraph Co. v. Philadelphia*, 190 U. S., 160. Unquestionably the amount of business which would probably be done and the posibility of doing it at a profit are elements to be taken into account in fixing a license tax for revenue, but we cannot see the end of a doctrine which would hold that a municipality in levying for a definite period a tax upon an occupation highly useful, though in its nature monopolistic, and so relieved of competition reducing its profits, is limit-

ed by the power of that occupation to earn a profit during that period. Nor does the evidence afford that view, at once comprehensive of conditions under which the appellant's company does business at Talladega year in and year out, which would justify us in pronouncing the tax in question to be void.

Williams vs. City of Talladega, 164 Ala., 633.
Atlantic Tel. Co. vs. Philadelphia, 190 U. S., 160.
Nashville & Chattanooga R. R. vs. Attalla, 118 Ala., 362.

The facts in this case fail utterly to show that the charge is unreasonable. It is shown that the estimate of the intra-state business was based solely on the cash receipts from such business during a limited period. There was no estimate, or attempted estimate, as to the amount received for telegrams sent collect. It is true the agent estimated one would offset the other, but if Plaintiff in error desired to be accurate he could have accurately ascertained the amount of telegrams sent collect as well as those received, and certainly clear and conclusive testimony is necessary to overturn a statute of this kind after the same has been passed on by a Judge trying the facts sitting as a jury and which finding has been affirmed by the State Court. Moreover, the Court would not say that the Telegraph Company should not be charged with those messages which are sent collect as well as those on which payments were made provided it is intra-state business. The evidence in this case is very vague and indefinite as to how much expenses were incurred by this Company at this, its Talladega, office, and how much was charged against the intra-state business as well as inter-state business. If licenses are not to be charged or collected only when a business is being run at a profit, then in many instances many people would be freed entirely from paying licenses, although they receive police protection and the benefits of the City Government just as

much as those who run their business at a profit. As is well said by Judge Sayre, it is not shown by any evidence here that this Company used diligence in transacting its affairs or in creating business. It may well be that if it had had another agent rather than the defendant, who was more prompt in attending to his business, that the receipts would be much larger, and for aught that appears the business for the ensuing nine months for which the license was fixed would be largely in excess of what it received during the particular time testified about, and the expenses less and the net earnings more. The witness Bacon states (see pages 23 and 24 of the transcript), that the charge of $600.00 for linemen was chargeable to this, Talladega, office, and it is not shown how much territory was covered by these linemen, nor how much really should be chargeable to Talladega, and he stated his only knowledge in regard to this matter was certain reports made to him, which was clearly hearsay and therefore could not be of any real legal value. Under these circumstances, it seems to us that there is nothing in this last contention, that the ordinance was confiscatory and therefor void, especially when this feature of it has been passed on by the State Court and upheld upon an appeal from the Court that tried the same without a jury upon findings on the facts under the decisions of Alabama, to be given the same weight as if decided by a jury.

See:

Wright vs. State, 129 Ala., 123.
Quillman vs. Gurley, 85 Ala., 594.

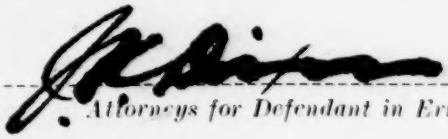
CONCLUSION.

In conclusion, we wish to say that it would seem if anything has been finally settled by the Supreme Court of the United States it has determined by a long line of decisions that the Western Union Telegraph Company is liable to be taxed, notwithstanding the fact that it has accepted the provisions of the Act of Congress of 1866, and we apprehend that this Court will not, at this late day, overturn these numerous decisions, extending back over a period of more than a quarter of a century, and we do not believe that this Court will hold that an ordinance directed simply against the business of a telegraph company, who is *commercially* engaged in the business of sending messages to and from the City to points in the State for hire or reward, is void because it does not in terms state that this charge should not be made against governmental messages, as a proper construction of the terms of the ordinance would exclude governmental messages, and moreover no service was shown to have been rendered to the United States Government for which pay was received by the office at Talladega, it simply showing that messages were relayed from and to Talladega, showing conclusively that as far as commercial business was concerned that none was transacted for the United States Government, and therefore such messages were not sought to be taxed by this ordinance, and as a matter of fact were not taxed. We do not apprehend that this Court would hold an ordinance would be invalid if such messages were included in the ordinance, provided it went to make up intra-state business, which the State had a right to consider in fixing its licenses.

We do not think this Court will hold the ordinance unreasonable and prohibitory and therefore void simply because this Company claims they are not making any net profits on its intra-state business in and out of Talladega and admit they enjoy all the benefits of police protection

and pay nothing therefor. Moreover, this is a matter for the State Court and it has been determined adversely to plaintiff in error.

We respectfully submit that the decision of the Supreme Court of Alabama should be affirmed.



Attorneys for Defendant in Error.